(21,248.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 192.

THE MOORE PRINTING TYPEWRITER COMPANY, A BODY CORPORATE; RUSSELL W. MONTAGUE, AND GEORGE P. MONTAGUE, APPELLANTS,

vs.

NATIONAL SAVINGS AND TRUST COMPANY AND AMERICAN PLANOGRAPH COMPANY, BODIES CORPORATE; ERNEST M. PEASE, HENRY J. GENSLER, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1854.

THE MOORE PRINTING TYPEWRITER CO. ET AL., Appellants,

vs.

NATIONAL SAVINGS AND TRUST CO. ET AL.

a Supreme Court of the District of Columbia.

No. 27204. In Equity.

NATIONAL SAVINGS AND TRUST COMPANY, a Body Corporate, Complainant,

vs.

THE MOORE PRINTING TYPEWRITER COMPANY and THE AMERICAN PLANOGRAPH COMPANY, Bodies Corporate; RUSSELL W. MONTAGUE and GEORGE P. MONTAGUE, for Themselves and Others; ERNEST M. PEASE, HENRY J. GENSLER, WILLIAM C. MAINS, JOHN D. MORGAN, WINTHROP POND, HENRY L. BRYAN, MARION BRYAN, WILLIAM M. KERR, ANDREW DEVINE, D—— C. MCEWEN, FREDERICK J. WARBURTON, JOHN H. WHITE, ALICE J. WHITE, EMILY J. WHITE, GEORGE OTIS SMITH, HENRY C. CORNWALL, GEORGE R. CORNWALL, BESSIE P. CORNWALL, JAMES O. CLEPHANE, JOHN T. GRANGER, RUDOLPH KAUFFMAN, CHARLES T. MOORE, JULIA B. MOORE and CECIL H. MOORE, and HENRY L. BRYAN, RICHARD C. THOMPSON, WILLIAM C. MAINS, and J. KEITH M. NORTON, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Bill.*

Filed July 2, 1907.

In the Supreme Court of the District of Columbia.

No. 27204.

NATIONAL SAVINGS AND TRUST COMPANY, a Body Corporate, Complainant,

vs.

THE MOORE PRINTING TYPEWRITER COMPANY and THE AMERICAN PLANOGRAPH COMPANY, Bodies Corporate; RUSSELL W. MONTAGUE and GEORGE P. MONTAGUE, for Themselves and Others; ERNEST M. PEASE, HENRY J. GENSLER, WILLIAM C. MAINS, JOHN D. MORGAN, WINTHROP POND, HENRY L. BRYAN, MARION BRYAN, WILLIAM M. KERR, ANDREW DEVINE, D—— C. MCEWEN, FREDERICK J. WARBURTON, JOHN H. WHITE, ALICE J. WHITE, EMILY J. WHITE, GEORGE OTIS SMITH, HENRY C. CORNWALL, GEORGE R. CORNWALL, BESSIE P. CORNWALL, JAMES O. CLEPHANE, JOHN T. GRANGER, RUDOLPH KAUFFMAN, CHARLES T. MOORE, JULIA B. MOORE and CECIL H. MOORE, and HENRY L. BRYAN, RICHARD C. THOMPSON, WILLIAM C. MAINS, and J. KEITH M. NORTON, Defendants.

The bill of complaint of the National Savings and Trust Company respectfully shows to the court as follows:

1. It is a body corporate, originally incorporated under the name of "The National Safe Deposit, Savings and Trust Company of the District of Columbia," now changed to "National Savings and Trust Company" by an act of Congress approved the 31st day of January, A. D. 1907. It sues as trustee as hereinafter shown.

2 2. The defendants the Moore Printing Typewriter Company and the American Planograph Company are bodies corporate. All of the other defendants, so far as known to the complainant, are citizens of the United States and residents, respectively, the defendants Russell W. Montague and George P. Montague of White Sulphur Springs, State of West Virginia; the defendants Ernest M. Pease, John D. Morgan, Winthrop Pond, William M. Kerr, Andrew Devine, D. C. McEwen, Frederick J. Warburton, John H. White, Alice J. White, Emily J. White, George R. Cornwall, Henry C. Cornwall, Bessie P. Cornwall and James O. Clephane, of the city and State of New York, the defendant William C. Mains of Mt. Vernon, New York, the defendant J. Keith M. Norton, of Alexandria, Virginia, the defendant Charles T. Moore, of Front Royal, Virginia, and the remaining defendants of the District of Columbia. The defendants William C. Mains, Richard C. Thompson and J. Keith M. Norton are sued as trustees, the defendant Henry L. Bryan as trustee and in his own right, and the remaining defendants in their own right as hereinafter shown.

3. Heretofore, to wit, on the 26th day of April, A. D. 1906, defendants George R. Cornwall, Bessie P. Cornwall, Marion Bryan, Winthrop Pond, Charles T. Moore, Henry C. Cornwall, William M. Kerr, Andrew Devine, John H. White, James O. Clephane, Rudolph Kauffman, John T. Granger, Ernest M. Pease and George Otis Smith, being the holders and representing themselves to be the owners, in the aggregate, of Thirty five thousand and five shares of the capital stock of the defendant the American Planograph Company, of the par value of One hundred dollars per share,
3 executed and delivered to the complainant, by its then name "The National Safe Deposit, Savings and Trust Company of the District of Columbia," a voting trust agreement, to continue in force from its said date, a copy of which instrument is herewith filed marked "Exhibit A," and prayed to be read as a part of this Bill.

4. Thereafter, to wit, on the 9th day of May, A. D. 1906, the complainant received written directions concerning the issuance of trust certificates, pursuant to the terms of the said voting trust, which certificates were duly issued as directed, a copy of which said directions is herewith filed marked "Exhibit B," also prayed to be read as a part of this Bill. At the present time, the said trust certificates stand on the books and in the records of this complainant in the names of the several persons mentioned in the said Exhibit B, with the single exception that the certificates so issued to the defendant Alice J. White have since been transferred and now stand in the name of Emily J. White. The defendant Richard C. Thompson has also executed a certain instrument in the nature of a trust, reciting that the defendants William C. Mains and himself hold trust certificates representing Twenty four thousand, nine hundred and forty shares of said stock in trust for the defendants Henry L. Bryan, George R. Cornwall and Charles T. Moore and their assigns, and a stock certificate for Six hundred shares of said stock in trust for the sole use and benefit of the defendant Ernest M. Pease.

5. The defendants Richard C. Thompson and Henry L.
4 Bryan, as the complainant is informed, believes and therefore avers, hold Twelve hundred and thirty five shares of the stock as trustees for the defendants George R. Cornwall, Charles T. Moore and Henry L. Bryan; while, as the complainant is further informed, believes, and therefore avers, the entire interests of the defendant Charles T. Moore in the stock of the said American Planograph Company were vested by some instrument in writing between the parties in the defendants Richard C. Thompson and J. Keith M. Norton as trustees.

6. In the case of Cecil H. Moore *versus* Charles T. Moore, Richard C. Thompson, J. Keith M. Norton, the American Planograph Company, and this complainant, being Equity Cause No. 26,731, and of Julia B. Moore against the said Charles T. Moore, Richard C. Thompson, J. Keith M. Norton, George R. Cornwall, Henry L. Bryan, Marion Bryan, the American Planograph Company and this complainant, being Equity Cause No. 26,847, now pending in

this court, restraining orders were issued and are now in force, restraining the defendants in the said equity causes, until the court's further order, from removing, attempting or permitting to be removed from the District of Columbia, and from selling, encumbering, or in any manner disposing of any of the shares of stock of the said American Planograph Company, in the possession or custody of this complainant.

7. As will be seen by reference to the said voting trust agreement of April 26, 1906, herewith filed as Exhibit A, it is therein provided that the complainant shall have the privilege of resigning its said position as trustee at any time during the term for which
5 it was appointed, and that it shall thereupon be fully relieved and discharged from all further duty and responsibility in the premises. The complainant has, accordingly, notified the parties in interest under and through whom it derives its position of trustee of its desire to resign its said position, and the holders of a majority in amount of the said trust certificates, by an instrument in writing, executed under their hands and seals, which is herewith filed, marked "Exhibit C", and prayed to be read as a part hereof, have duly nominated and appointed the New York Trust Company, of the City of New York and State of New York, to be the trustee under the said Agreement in the place and stead of the complainant.

8. On or about the 22d day of May, A. D. 1906, the complainant received a paper writing purporting to be executed by or on behalf of the Moore Printing Typewriter Company and the defendants Russell W. Montague and George P. Montague, for themselves and certain unknown other parties, alleging that a large part, exceeding in number Thirty Thousand, of the shares of the American Planograph Company covered by the above mentioned voting agreement to this complainant, had been so transferred to it by a breach of trust on the part of the holders of certain of the said shares, who it was alleged were trustees for the said Moore Printing Typewriter Company, Russell W. Montague, George P. Montague, and other parties represented by them, and that a suit had been filed in the Circuit Court of Kanawha County, in the State of West Virginia, by the parties claiming to be beneficiaries under the said
6 alleged trust, against the American Planograph Company and certain other parties in the said paper writing mentioned, for the determination, among other things, of the ownership of the said shares of stock, a copy of which said notice is herewith filed, marked "Exhibit D", and prayed to be read as a part of this Bill.

9. By reason of the said restraining orders in Equity Causes Nos. 26,731 and 26,847, and of the said written notice Exhibit D, the complainant is advised that it may not transfer the said shares of stock in its possession to the said New York Trust Company as its successor in the said trust, without the risk of liability and loss, except through the aid of this court, and that it is entitled in its said capacity as a trustee to apply to this court for its instructions and its protection in the premises.

Wherefore, and because it is without adequate remedy at law, the complainant prays as follows:

1. That the Moore Printing Typewriter Company and the American Planograph Company, bodies corporate, Russell W. Montague and George P. Montague, for themselves and others, Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D—— C. McEwen, Frederick J. Warburton, John H. White, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains and J. Keith M. Norton may be made
7 parties defendant hereto, served with process and required to answer the exigency of this Bill, notice to be given by publication to such of the defendants as cannot be served personally.

2. That the complainant may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee; and that the complainant may be instructed by the court as to the manner and form of transfer by it to its successor in the said trust.

3. That it may be allowed such reasonable fees and costs, in addition to the compensation for its services which is provided for in and by the said agreement Exhibit A, as to the court may seem meet and proper under the circumstances of the case.

4. And that it may have such other and further relief as the nature of the case may require.

[SEAL.] NATIONAL SAVINGS & TRUST COMPANY,
By WM. D. HOOVER,
Second Vice President.

Attest:

CHARLES E. NYMAN, *Secretary.*
J. J. DARLINGTON, *Solicitor.*

DISTRICT OF COLUMBIA, *ss:*

I, William D. Hoover, on oath say that I am the Vice President of the National Savings and Trust Company, the complainant in the foregoing Bill of Complaint, and its agent for the purpose of verifying the same; that I have read the said Bill of Com-
8 plaint and know the contents thereof, that the allegations therein set forth as of my personal knowledge are true, and that those set forth upon information and belief I believe to be true.

WILLIAM D. HOOVER.

Subscribed and sworn to before me this 29th day of June, A. D. 1907.

[SEAL.] CHAS. C. LAMBORN,
Notary Public.

9 "EXHIBIT A."

Copy.

Articles of Agreement entered into this 26th day of April, 1906, by and between Bessie P. Cornwall, Marion Bryan, George R. Cornwall, Winthrop Pond, Charles T. Moore, H. C. Cornwall, William M. Kerr, Andrew Devine, J. H. White, James O. Clephane, Rudolph Kauffmann, J. T. Granger, E. M. Pease, Geo. O. Smith, parties of the first part and the National Safe Deposit, Savings and Trust Company of the District of Columbia, party of the second part, witnesseth:

Whereas the parties of the first part are severally stock holders of the American Planograph Company a corporation organized under the laws of West Virginia.

And whereas it is deemed important to the interests of the stockholders of the American Planograph Company that a majority of the issued stock of said company be held together in trust in order that the stock of said Company shall not be liable to be bought up for speculative control or come into the possession of those who may not desire the success of the Company, and in order to secure a safe and prudent management in the interests of the stockholders and to guard against the sale, lease, or bonding of the property of the said Company without full knowledge and due consideration on the part of the stockholders.

And whereas the party of the second part is willing to act as trustee for the parties of the first part in accordance with the terms and conditions hereinafter mentioned.

10 Therefore, for and in consideration of these premises and of One Dollar ($1.00) by each of the parties hereto to each of the others in hand paid the receipt of which is hereby acknowledged, the parties of the first part hereby agree and each for himself to and with the party of the second part to transfer and convey or cause to be transferred and conveyed to the party of the second part shares of stock in the said Company amounting in the aggregate to 35,005 shares to be held by the party of the second part in trust for the uses and purposes and subject to the provisions hereinafter mentioned.

And it is hereby mutually agreed by and between all the parties hereto that on the receipt of the respective certificates of the said 35,005 shares of stock by the said trustee from the parties of the first part, the said trustee shall cause to be delivered to each of the parties of the first part who contribute toward said 35,005 shares an assignable trust certificate which shall recite the number of shares so deposited by him and state that the holder thereof is entitled to an equitable interest in the said 35,005 deposited shares equivalent to the number of shares so conveyed to and deposited with said trustee by each of said depositors respectively, and that the holder of said trust certificate or certificates has no right to vote on any such shares, but shall be entitled to receive his pro rata share of any dividends

paid on the deposited stock and that on and after March 31, 1911 each holder of such trust certificate will on surrender thereof
11 to the said trustee be entitled to a certificate of an equal number of shares of stock of the American Planograph Company, and the trustee shall forthwith cause to be transferred on the books of the American Planograph Company the stock so held in trust and deliver the certificates thereof to each of the holders of the said trust certificates.

And it is further mutually agreed by and between the parties hereto that the recital to be inserted in such trust certificates as above set forth, shall be binding and obligatory on all the parties to this agreement and their heirs, executors and assigns.

And it is further mutually agreed by and between all the parties hereto that the said trustee shall on the receipt and deposit of such shares with him cause the same to be transferred on the books of the said Company and a new certificate for the 35,005 shares to be issued to it as trustee for the parties of the first part.

And it is further mutually agreed that a list or record of such deposited shares shall be made and kept by the said trustee which shall contain the names of the contributors and the number of shares contributed by each shareholder, and that provision shall be made by the said trustee for the proper transfer of the trust certificates and for the registration thereof at the office of the said trustee in Washington, D. C. and on receipt of notice of a stockholders' meeting the said trustee shall forward the same as soon as possible to each of the trust certificate holders, and the said trustee shall by its
12 proper officer, representative, or agent, attend the stockholders' meeting and cast the vote of the whole 35,005 shares, or any part thereof, for such measures and such persons as the owners of a majority in amount of said trust certificates shall direct.

It is further understood and agreed that the legal title to the stock transferred under or by virtue of this agreement shall remain vested in the said trustee and its successors in trust during the continuance of the trust herein provided, and the said trustee shall demand, receive, and collect the dividends thereon from time to time as they may be declared by said Company, which the said trustee shall pay or cause to be paid to the stockholders of the trust certificates aforesaid.

It is further agreed that the said trustee shall on the written assent of three fourths of the owners in amount of said trust certificates admit to the benefit of this trust on an equal footing with the original parties hereto, such stockholders in said Company as may desire to become parties to this agreement upon their assent in writing to the terms hereof.

It is further agreed that in case the said trustee shall decline to accept or serve, or upon the resignation of said trustee during the term for which it is or may be appointed or elected, then the holders of a majority in amount of the trust certificates shall elect a trustee to fill the vacancy or vacancies.

It is further agreed that the said trustee shall be a stockholder of

said Company and shall receive for its services the sum of
13 Seventy Dollars ($70.00) per year to be paid by the owners of the trust certificates pro rata according to each one's holdings.

It is hereby further mutually agreed that this contract and trust hereby created and provided for shall continue to be and remain in force from date hereof until April 26, 1911, it being understood and agreed however that the said trust may be dissolved before April 26, 1911 by a vote of three fourths of the holders of said trust certificates at a meeting specifically called for that purpose.

In witness whereof the undersigned stockholders as aforesaid have hereunto subscribed their names and set opposite thereto the number of shares held or owned by them respectively which they desire to be held in trust as aforesaid, and the said National Safe Deposit, Savings and Trust Company as an evidence of its acceptance of the trust herein imposed has caused its corporate Seal to be affixed, and this instrument to be signed by its President and Secretary the day and year first above written.

Signed in triplicate.

E. M. Pease	1201	shares
Bessie P. Cornwall	2000	"
Geo. R. Cornwall	1385	"
W. M. Kerr	616	"
Andrew Devine	1850	"
John H. White	1158	"
Geo. Otis Smith	1000	"
Winthrop Pond	9889	"
H. C. Cornwall	608	"
Jas. O. Clephane	1599	"
John T. Granger	190	"
Rudolph Kauffmann	450	"
Charles T. Moore by Richard C. Thompson, Committee Chas. T. Moore	11049	"
Marion Bryan	2010	"
	35005	"

14 "EXHIBIT B."

Copy.

WASHINGTON, D. C., *May* 9, 1906.

The National Safe Deposit, Savings and Trust Co., D. C.

DEAR SIR: In behalf of the parties to the agreement of April 26th and who contributed the stock for which was issued certificate No. 1135 for 35005 shares of the capital stock of the American Planograph Company in your name, I have the honor to request that the Trust certificates provided for in said agreement be allotted as follows:

On account of E. M. Pease..... 1201

E. M. Pease..... 201
H. J. Gensler..... 400
R. C. Thompson and W. C. Mains, Trustees..... 600

On account of Geo. R. Cornwall..... 1385

W. C. Mains..... 100
John D. Morgan..... 50
H. L. Bryan and R. C. Thompson, Trustees..... 1235

On account of W. M. Kerr..... 616

W. M. Kerr, Twelve certificates of 50 shares each and one of 16 shares.

15

On account of Andrew Devine..... 1850

Andrew Devine..... 670
D. C. McEwen..... 350
F. J. Warburton..... 830

On account of John H. White..... 1158

John H. White..... 1058
Alice J. White..... 100

On account of Geo. Otis Smith..... 1000

Geo. Otis Smith..... 1000

On account of Bessie P. Cornwall..... 2000

R. C. Thompson, and W. C. Mains, Trustees..... 2000

On account of Winthrop Pond..... 9889

R. C. Thompson and W. C. Mains, Trustees..... 9889

On account of H. C. Cornwall..... 608

H. C. Cornwall 12 certificates of 50 shares each and one of 8.

On account of James O. Clephane..... 1599

James O. Clephane 31 certificates of 50 shares each, and one of 49 shares.

On account of John T. Granger..... 190

J. T. Granger..... 190

On account of Rudolph Kauffmann..... 450

Rudolph Kauffmann..... 450

16

On account of Chas. T. Moore..... 11049

R. C. Thompson and W. C. Mains, Trustees..... 11049

On account of Marion Bryan..... 2010

R. C. Thompson and W. C. Mains, Trustees..... 2010

Of the above described allotment to R. C. Thompson and W. C. Mains, Trustees, amounting to 25548 shares, please issue as follows:

1	certificate	.....	17000
3	"	of 2000 each.....	6000
1	"	.....	1000
1	"	.....	848
1	"	.....	600
1	"	.....	100
			25548

Respectfully yours,
(Signed) HENRY L. BRYAN.

17 "EXHIBIT C."

Law Offices of William C. Mains, Post Office Building, Mount Vernon, N. Y.

New York Offices, 62 Broadway.

Know all men by these presents, that I, William C. Mains, of the City of Mount Vernon, County of Westchester and State of New York, do hereby make, constitute and appoint Richard C. Thompson, of the City of Washington, District of Columbia, my true and lawful attorney, for me and in my name to sign and execute a petition in the matter of certain trustee stock of the American Planograph Company, whereby and in which petition is *is* sought among other things to secure the appointment of the New York Trust Company as Trustee of said stock in the place of The National Safe Deposit Savings and Trust Company of Washington, D. C., and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as I might do if I were personally present.

In witness whereof I have hereunto set my hand and seal this 19 day of June, 1907.

WILLIAM C. MAINS. [L. S.]

In the presence of

HENRY SEAMAN.

18 Know all men by these presents, that whereas, in pursuance of an agreement in writing bearing date the 26th day of April, 1906, the undersigned, together with other persons signing said agreement, transferred and conveyed to the National Safe Deposit, Savings and Trust Company of the District of Columbia, shares of stock in the American Planograph Company, amounting in the aggregate to 35005 shares, to be held by it as trustee for the uses and purposes in said agreement specified, and said National Safe Deposit, Savings and Trust Company has issued its assignable trust certificates as in and by said agreement provided, and

Whereas, it is expressly provided in said agreement that upon the resignation of said National Safe Deposit, Savings and Trust Company as trustee during the term for which it was appointed, the holders of a majority in amount of said trust certificates shall elect a trustee to fill such vacancy, and

Whereas, the said National Safe Deposit, Savings and Trust Company has notified the holders of its trust certificates of its desire and intention to resign from the position of such trustee,

Now therefore, the undersigned, being the holders and owners of a majority in amount of said trust certificates, do hereby nominate, constitute and appoint the New York Trust Company, of the City and State of New York, as the trustee under the agreement hereinbefore mentioned, in place and stead of the said National Safe Deposit, Savings and Trust Company.

19 In witness whereof, we have hereunto set our hands and seals this seventeenth day of June, 1907.

BESSIE P. CORNWALL, [SEAL.]
GEO. R. CORNWALL, [SEAL.]
ERNEST M. PEASE, [SEAL.]
JOHN D. MORGAN, [SEAL.]
WINTHROP POND, [SEAL.]
MARION BRYAN, [SEAL.]
HENRY L. BRYAN,
R. C. THOMPSON,
Trustees, [SEAL.]
R. C. THOMPSON,
J. K. M. NORTON,
Trustees Chas. T. Moore, [SEAL.]
R. C. THOMPSON,
W. C. MAINS,
Trustees, [SEAL.]
By R. C. THOMPSON,
Attorney in Fact.

20 "EXHIBIT D."

Copy.

Office of George Prescott Montague, Counsellor at Law, McGill Building, 908 G Street N. W.

WASHINGTON, D. C., *May* 22, 1906.

National Safe Deposit, Savings and Trust Company of the District of Columbia, Washington, D. C.

GENTLEMEN: Referring to the thirty-five thousand and five (35005) shares of stock of American Planograph Company held by your Company as trustee, and voted by it through its agents at the Annual Meeting of the stockholders of American Planograph Company, held at Charlestown, West Virginia, May 16, 1906, you are hereby notified that a large part of said thirty-five thousand and five (35005) shares of stock is claimed by the undersigned to be subject to a trust for them, and that suit is now pending in the Circuit Court of Kanawha County, West Virginia, to determine, among other things, the ownership thereof, being a suit in equity brought by

THE MOORE PRINTING TYPEWRITER COMPANY, RUSSELL W. MONTAGUE and GEORGE P. MONTAGUE, for Themselves and Others, Plaintiffs,

vs.

21 AMERICAN PLANOGRAPH COMPANY, GEORGE R. CORNWALL, BESSIE P. CORNWALL, CHARLES T. MOORE, RICHARD C. THOMPSON, Individually and as Committee of said Charles T. MOORE, an Adjudged Lunatic; HENRY L. BRYAN, MARIAN BRYAN, WINTHROP POND, JOHN H. WHITE, RUDOLPH KAUFFMANN, JOHN T. GRANGER, Defendants,

and you are hereby cautioned against transferring said stock or parting with the possession of it, as the undersigned claim that such stock being subject to a trust in their favor, you will be liable, after this notice, to account to them for such portion thereof as may be adjudged in said suit, or otherwise shown, to be their property, or property in which they, or any of them, have a beneficial interest.

Particular reference is made to certificates issued for a block of about twenty-seven thousand (27000) shares of stock of American Planograph Company, formerly represented by the following certificates, viz:

Certificate No.	9,	Bessie P. Cornwall	1000
" "	10,	" " "	1000
" "	11,	Marian Bryan	1000
" "	12,	" "	1000
" "	13,	Henry L. Bryan	5
" "	14,	" " "	5
" "	262,	Chas. T. Moore	65
" "	265,	" " "	40
" "	550,	" " "	5500

22 Certificate No. 507, Winthrop Pond..... 8887
" " 607, " " 1500
Also shares supposed to be carried on the books of the Company until very recently in the name of Charles T. Moore, being stock issued for Cert. No. 5, 1000 shares
6, 1000 "
510, 3944 "
508, 1000 "
6944
26946

The certificates now representing these twenty six thousand nine hundred and forty-six (26946) shares can easily be ascertained by reference to the books of the Company.

The amount of stock of American Planograph Company in controversy in the above mentioned suit is more than thirty thousand (30000) shares.

Yours very truly,

(Signed) THE MOORE PRINTING TYPEWRITER COMPANY,
By RUSSELL W. MONTAGUE,
Its President.

(Signed) RUSSELL W. MONTAGUE AND GEORGE P. MONTAGUE,
For Themselves and Other Stockholders and Creditors of The Moore Printing Typewriter Company as well as for Other Stockholders of The Linomatrix and American Planograph Companies.

23 *Subpœna to Answer.*

Issued July 2d, 1907.

In the Supreme Court of the District of Columbia.

No. 27204, Equity Docket.

NAT. SAVINGS & TRUST CO., Complainant,
against
THE MOORE PRINTING TYPEWRIT*ing* CO. ET AL., Defendants.

The President of the United States to (1) The Moore Printing Typewrit*ing* Company, (3) Russell W. Montague, & (4) George P. Montague, Defendants:

You are hereby commanded to appear in this Court, at its first Special Term, occurring ten days after service of this Subpœna, exclusive of Sundays and legal holidays, and answer the exigency of

the original Bill, under pain of attachment, and such other process of contempt as the Court shall award.

Witness, The Honorable Harry M. Clabaugh, Chief Justice of said Court, the 2nd day of July, A. D. 1907.

[SEAL.] JOHN R. YOUNG, *Clerk*,
By F. E. CUNNINGHAM,
Assistant Clerk.

MEMORANDUM.—That the defendant, herewith served, is to enter — appearance in this suit, in the Clerk's Office, on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

24 *Marshal's Return.*

Summoned defendants as follows:
No. 1 by service on Russell W. Mantague, president.
3 personally
July 22 1907.
4 personally
August 5 1907.

AULICK PALMER, *Marshal.*
S.

J. J. DARLINGTON, *Att'y.*

25 *Order for Appearance.*

Filed August 5, 1907.

In the Supreme Court of the District of Columbia, the 5th Day of August, 1907.

Equity. No. 27204.

THE NATIONAL SAVINGS & TRUST CO.

vs.

THE MOORE PRINTING TYPEWRITER CO. ET AL.

The Clerk of said Court will enter my appearance for defendants The Moore Printing Typewriter Co., Russell W. Montague and George P. Montague.

C. A. KEIGWIN, *Solicitor.*

26 *Answer of The Moore Printing Typewriter Company.*

Filed September 3, 1907.

In the Supreme Court of the District of Columbia.

No. 27204. In Equity.

NATIONAL SAVINGS AND TRUST COMPANY, a Body Corporate, Complainant,

vs.

THE MOORE PRINTING TYPEWRITER COMPANY and THE AMERICAN PLANOGRAPH COMPANY, Bodies Corporate; RUSSELL W. MONTAGUE and GEORGE P. MONTAGUE, for Themselves and Others; ERNEST M. PEASE, HENRY J. GENSLER, WILLIAM C. MAINS, JOHN D. MORGAN, WINTHROP POND, HENRY L. BRYAN, MARION BRYAN, WILLIAM M. KERR, ANDREW DEVINE, D. C. MCEWEN, FREDERICK J. WARBURTON, JOHN H. WHITE, ALICE J. WHITE, EMILY J. WHITE, GEORGE OTIS SMITH, HENRY C. CORNWALL, GEORGE R. CORNWALL, BESSIE P. CORNWALL, JAMES O. CLEPHANE, JOHN T. GRANGER, RUDOLPH KAUFFMAN, CHARLES T. MOORE, JULIA B. MOORE and CECIL H. MOORE, and HENRY L. BRYAN, RICHARD C. THOMPSON, WILLIAM C. MAINS, and J. KEITH M. NORTON, Defendants.

The Moore Printing Typewriter Company, hereinafter for the sake of brevity called The Moore Typewriter Company, or the Moore Company, saving and reserving all exceptions which can or may be taken to the errors, imperfections and uncertainties of said bill, for answer thereto, or to so much thereof as this defendant is advised it is material for it to answer, answering says:

1. That this defendant is a corporation duly organized and
27 existing under the laws of the State of West Virginia, and that the American Planograph Company is likewise a West Virginia corporation.

2. Referring to paragraphs 1 and 2 of the bill this defendant admits that the complainant is correctly described, but as to the descriptions of the several defendants, while it admits that Russell W. Montague is correctly described as a resident of White Sulphur Springs, West Virginia, it says that George P. Montague is a resident of Washington, in the District of Columbia, and not of said White Sulphur Springs; and it further alleges on information and belief that James O. Clephane, John H. White, Alice J. White, and Emily J. White are residents of Englewood, in the State of New Jersey, and not of the City and State of New York.

As to the other defendants, it neither admits nor denies the correctness of the descriptions of them, though it believes that several of those described as residents of the City and State of New York, are residents of the State, but not of the City of New York.

3. This defendant neither admits nor denies the allegations in the third, fourth, fifth, sixth, and seventh paragraphs of the bill of

complaint in this suit, but it says that 35,005 shares of the stock of the said Planograph Company stand in complainant's name on the books of the Planograph Company.

4. Defendant admits that it, with others, gave the notice referred to in the eighth paragraph of the bill, a copy of which notice is hereto annexed marked Exhibit A, and made a part hereof, and it admits generally the other allegations in said eighth paragraph.

28 5. And for further answer, the said Moore Printing Typewriter Company says that heretofore, viz., in January, 1900, as well as for a long time both prior and subsequent thereto, the said Moore Typewriter Company, either by itself or through the Linomatrix Company, (a sub-company of which seven-tenths of the stock belonged to the said Moore Typewriter Company and its stockholders) owned all the inventions and patents for the United States of Charles T. Moore, a defendant herein, in any way relating to typewriting and printing machines, (except his so-called bar patent and such devices connected therewith as he had previously to the year 1894 assigned to the Mergenthaler Linotype Company) together with all his future improvements thereon, said Moore having expressly covenanted in regard to future improvements to assign to the said Moore Typewriter Company, its successors and assigns, any and all inventions which he might thereafter make relating to typewriting, typesetting, printing and justifying machines or machinery, or devices or contrivances pertaining thereto, or improvements in the arts of typewriting, printing, typesetting, stereotyping, electrotyping, lithographing, or other similar processes, and all United States patents which might be issued therefor, including all his applications then pending in the United States Patent Office.

That at or about the above-mentioned date, viz., January, 1900, the said Charles T. Moore and Henry L. Bryan, another defendant herein, notwithstanding the fact that they were each of them at that time directors in both the Moore Typewriter and Lino-

29 matrix Companies, entered into a conspiracy with George R. Cornwall, another party defendant in this suit who had knowledge, as defendant is informed and believes, of the official relations of the said Moore and Bryan to the said Companies, for the purpose of wrecking said two companies, or acquiring their assets for an inadequate sum, or otherwise injuring them for their own benefit and profit; that in pursuance of such purpose, the said Moore and Cornwall, and the said Moore, Cornwall and Bryan then and thereafter entered into certain agreements, copies of which are hereto attached and made a part hereof, marked Exhibits B, C and D, (the copy in the case of Exhibit C being a copy of a paper which this defendant is informed and believes is a copy of an agreement between said Moore, Cornwall and Bryan, being the agreement referred to in the so-called supplementary agreement set forth in Exhibit D) by which, among other things, it was mutually agreed that the said Moore should employ himself to the said Cornwall for the purpose of perfecting inventions relating to printing, justifying, &c., and for preparing, and taking out patents therefor, said

inventions being the same and of the same character as those he (the said Moore) had already assigned to the Moore Typewriter Company, that in performing this service he was to give the said Cornwall the benefit of his (the said Moore's) ideas, and was to refrain from inventing for any other company, or companies; that the whole plan was simply a scheme to enable the said Moore to evade his obligations and contracts to and with the said Moore Typewriter and Linomatrix Companies, and to embody his
30 ideas and the inventions he had already assigned to those Companies in patents that could be taken out in the name of said Cornwall or in names other than his own, and assigned to a new Company of which Moore, Bryan and Cornwall were to have absolute control.

6. That the company thus formed was the American Planograph Company, and that it was formed for the purpose of carrying out a fraud, and was to be used, and was used, as a means for wrecking or injuring the said Moore Typewriter and Linomatrix Companies and securing their assets for an inadequate consideration; that said Planograph Company was incorporated under the laws of the State of West Virginia, in the year 1900, to wit, on February 6, 1900, for one million five hundred thousand dollars ($1,500,000), divided into fifteen thousand shares having a par value of one hundred dollars ($100); that of the said fifteen thousand shares, fourteen thousand nine hundred and ninety-five shares were issued to the said Cornwall for certain patents and patent applications of his, and for "a proposed design producing apparatus which automatically prints and justifies lines of characters by means of a perforated tape of paper, and the mechanism operated by keyboard for effecting the perforations, and upon which apparatus it is intended to make applications for patents, together with all future improvements on all said inventions and patents, for use within the United States and Dominion of Canada," the said Cornwall agreeing to make application for Canadian Letters Patent on the foregoing inventions and those covered by the United States Letters Patent, whenever requested so to do by said
31 Planograph Company.

That in addition to receiving all the stock of the Company, except the five incorporators' shares, the said Cornwall was to receive four hundred dollars ($400) of the five hundred dollars ($500) realized, or presumed to be realized from the sale of said five shares, and also ten per cent. of the gross receipts of the Company, the exact terms of this agreement being set forth in a letter from the said Cornwall, dated March 12, 1900, to the Board of Directors of the said Planograph Company, and the vote of the Board accepting the offer so made, copies of which letter and vote of acceptance are hereto annexed and made a part hereof, and marked Exhibit E.

And this defendant further says that at the time the above-mentioned offer was made and accepted the board of directors of said Planograph Company consisted of five members, who owned only one share apiece, two of whom, including the President of the Company, were uncles of the said Cornwall, and the other three were persons nominated and controlled by him and the said Charles T. Moore;

that soon thereafter three of the members of the board resigned to give place to the said Cornwall, Winthrop Pond, a brother-in-law of the said Cornwall, and Henry L. Bryan, all of whom were elected directors of the Company at a meeting of the directors held on or about May 9, 1900, and the last-named made Secretary as well, which office he has held to the present time, and that subsequently said Charles T. Moore was elected a director of said Company, and afterwards became its President.

32 7. And this defendant further says on information and belief, that the said patents, and applications for patents of the said Cornwall for which Planograph stock was issued as aforesaid, are of little real value, and that none of them, with the possible exception of the acid resistant patent and the two applications for patents, have been of any use in the practical operation of planograph printing; that practically the really valuable asset that the Company received from said agreement was the proposed design for automatically producing printed lines duly justified.

That while it is conceded that Cornwall had a transfer process of value, yet it is claimed that the composing machine or printer is the most valuable feature of the art of planographic printing, so-called, and that this part of the invention is due entirely to Charles T. Moore, and to such employees of the several companies as have practically worked out the machines under said Moore's superintendence, or in accordance with his ideas and suggestions, and is in no proper sense due to any invention of said George R. Cornwall, and in this connection reference is made to a letter to the said Moore, dated September 19, 1900, from H. G. Gensler, one of the defendants herein, and one, who it is alleged on information and belief, aided and abetted the said Moore and Cornwall in their said conspiracy, a copy of which letter is hereto attached and made a part hereof, and marked Exhibit F.

8. And this defendant further says that soon after the formation of the Planograph Company, the said Moore, Bryan and Cornwall exhibited a printing machine, or a printer, so-called, which

33 had been constructed and was then owned by the Moore Typewriter and Linomatrix Companies, and represented that it was a machine belonging to the Planograph Company, although they well knew that the Planograph Company had no title to the machine nor any property in it; that said exhibitions were made with the greatest secrecy and that no one was permitted to see the machine who would be likely to recognize it, other than those who were parties to the deception; that in the summer of the year 1900, the said machine built by the Moore Typewriter and Linomatrix Companies was secretly taken to Quebec, Canada, and afterwards to Saratoga, New York, by the said Charles T. Moore, with the full knowledge of the said George R. Cornwall, for the purpose of taking said machine apart and reassembling it in a disguised form, which work was to be done, under the supervision of the said Moore, by one Edwards, a draughtsman, and by two former employees of the Moore Typewriter and Linomatrix Companies, viz., Walter Gribben, the mechanic and model maker who had built this machine, and Ralph

A. Gleason, who had made drawings of and for it, the avowed object of this action, to use the language of said Moore, being "to make the Cornwall machine look as little like the Moore model as possible, and yet contain all the patentable features in a practicable way," as is shown by the letters of the said Moore, Cornwall, and Gleason, copies of which, or of certain material portions thereof, are hereto attached and made a part hereof, and marked Exhibits G, H, I.

9. That by means of said printer built by the Moore and Linomatrix Companies very large sums of money were obtained
34 by the said Moore and Cornwall, upwards of one hundred thousand dollars ($100,000), as defendant is informed and believes; that in the spring of the year 1901, said Moore and Cornwall, believing that their present course was becoming unsafe, as defendant is informed and believes, and recognizing that in order to get in capital on a large scale, they must have a better title to show, came to this defendant and made representations to it and the Linomatrix Company, and the officers, directors and stockholders of said Companies, to the effect that the said Planograph Company was a flourishing concern, the stock of which had sold as high as seventy-five dollars ($75) a share on a capitalization of one million five hundred thousand dollars ($1,500,000); that it owned and controlled very valuable inventions, patents, and processes which would revolutionize the art of printing; that said inventions and patents were of the same general character as those owned and controlled by the Moore Typewriter and Linomatrix Companies, and practically paralleled them; and that specimens of the print actually made by the Moore and Linomatrix printer was exhibited to them as work of the so-called Cornwall or Planograph printer; that said Planograph Company was about concluding negotiations with very large capital involving more than half a million dollars; that while the inventions and patents owned and controlled by the Moore Typewriter and Linomatrix Companies were not really necessary to the success of the Planograph Company, and that Company could get along without them, yet it would be of some advantage to the Planograph Company to control them, and a consolidation of the
35 three Companies would be for the mutual benefit of all; and that with the new capital that was about to come in under the negotiations above referred to, the stock of the consolidated Company would at once assume large value, and the three Companies by means of the consolidation would all be put on a sound and substantial business basis, and thereupon the following proposition was made, viz., that the capitalization of the Planograph Company should be increased from one million five hundred thousand dollars ($1,500,000) to ten million dollars ($10,000,000), divided into one hundred thousand shares, having a par value of one hundred dollars ($100) each; that forty thousand (40,000) of said shares should remain in the treasury unissued, and the remaining sixty thousand (60,000) shares should be used for the following purposes, viz., thirty-six thousand (36,000) shares should be reserved for carrying out the negotiations above mentioned and hereinbelow more fully described; ten thousand shares should be given to the Moore Type-

writer and Linomatrix Companies, five thousand shares to each Company, for their inventions and property; and the remaining fourteen thousand shares should remain and belong to the Planograph Company or its then stockholders.

That the terms of said negotiations respecting the thirty-six thousand (36,000) shares, as stated at the time to the directors and stockholders of the said Moore Typewriter and Linomatrix Companies, were as follows, viz.: Upon and in consideration of the payment of seventy-five thousand dollars ($75,000), which sum was to be credited as part payment in case the option was taken up, an
36 option was to be given on thirty-six thousand (36,000) shares of said Planograph stock for six hundred thousand dollars ($600,000), three hundred thousand — ($300,000) of which was to go into the treasury of the Planograph Company, and the other three hundred thousand — ($300,000) to the said Cornwall, but that of the first payment of $75,000, $50,000 was to go to the Planograph Company, and $25,000 to the said Cornwall, that in case the parties failed to take up said option, then and in that case they were to receive stock at fifty dollars ($50) a share for the initial payment of seventy-five thousand dollars ($75,000) instead of at the pro rata of sixteen and two-third dollars ($16⅔) a share; further, it was provided that in the case of the failure of said negotiations, eighteen thousand (18,000) of the said thirty-six thousand (36,000) — were to remain and belong to said Planograph Company for its use and benefit; that the said option is sometimes spoken of as the Pittsburg option, as the persons who were to furnish the capital were Pittsburg parties.

That said proposition made to the said Moore Typewriter and Linomatrix Companies was accepted, and that the papers made to carry it into effect, including an agreement or declaration of trust by the said Cornwall respecting the said thirty-six thousand (36,000) shares reserved to carry out the said proposed negotiations, with a provision that in case of the failure to carry out the same, eighteen thousand (18,000) of the said thirty-six thousand (36,000) shares should remain for the benefit of the Planograph Company, were all delivered at the same time, on or about June 1, 1901, and were all part
37 of the same transaction, viz., the consolidation of the three companies; which papers are set forth at length by copy, or described, in Exhibit marked J hereto annexed and made a part hereof.

10. And this defendant says that when the outstanding stock of the Planograph Company was increased from fifteen thousand (15,000) shares having a face value of one million five hundred thousand dollars ($1,500,000) to sixty thousand (60,000) shares having a face value of six million dollars ($6,000,000), ten thousand (10,000) shares were issued to the Moore and Linomatrix Companies, and their stockholders, to carry out the terms of the consolidation agreements in that particular, and that the remaining thirty-five thousand (35,000) shares, having a par value of three million five hundred thousand dollars ($3,500,000) were issued to the said Cornwall for practically a nominal consideration, viz: ten thousand shares (10,000), (one million dollars ($1,000,000) face

value) were issued to him "in consideration of the release by him to the company of his right to receive ten per centum of the gross receipts, and agreement on his part to accept in lieu thereof, fifteen dollars ($15) annual royalty upon each machine sold, leased or rented or otherwise disposed of by the Company, or operated by it for profit," while the only consideration he gave for the remaining twenty-five thousand (25,000) shares, (two million five hundred thousand dollars ($2,500,000) face value) which were issued to him

38 (eighteen thousand (18,000) of which properly belonged to the treasury of the Company in case of the failure of the Pittsburg option aforesaid) besides a certain amount of money derived from the sale of said stock itself, was his agreement "to assign to the Company the right to take out patents in Mexico and the South and Central American Countries upon the inventions heretofore assigned to the Company for the United States and Canada, and all improvements thereon;" and respecting such inventions it is alleged that where patents had been taken out in the United States or Canada on said inventions, the right to take out patents in such countries had expired, and further that the right generally was and is considered of so little value that, as this defendant is informed and believes, the Planograph Company has not availed itself of the privilege in a single instance even to the extent of making application for a patent in any of those countries.

It is admitted that it is claimed as a further consideration for such issue of stock, the said Cornwall was "to turn over to the Company the plant and machinery now" (then) "operated by him in the City of New York, for the purpose of demonstrating and exploiting the inventions covered by Letters Patent owned by the Company," but it is alleged on information and belief that such plant belonged at that time to the Company, or at least that it was purchased and acquired by means of money realized from the sale of Planograph stock, and besides, that it was of comparatively little value.

11. And this defendant submits that it is entitled to all

39 the stock, money and other things that the said Moore and Bryan, two of its own directors, have received from the above-mentioned acts in excess of what they were entitled to receive as stockholders in common with other stockholders, exclusive of any part they may have received of the said eighteen thousand (18,000) shares, and that such stock is trust stock, and that they are trustees of this defendant to the amount of said stock, and that the said Cornwall having joined and conspired with the said Moore and Bryan is likewise responsible and liable for the amount of stock so wrongfully obtained by the said Moore and Bryan, and as well as for the stock he obtained for and on account of the inventions and patents of the said Moore, or for any patents and inventions other than such of his own as he has actually contributed to said Planograph Company at a fair and just valuation.

And this defendant says that after the consolidation of the said three companies in June, 1901, the said Moore, Cornwall, and Bryan held about twenty-eight thousand (28,000) shares, in addition to what the said Moore and Bryan were entitled to receive, and

exclusive of the eighteen thousand (18,000) shares referred to in the paper or declaration signed by said Cornwall under date of June 1, 1901, and shown in Exhibit J. And defendant says, that of this 28,000 shares, 26,831 were represented by the following certificates, all of which were issued to the said Moore, Cornwall and Bryan or their appointees, viz:

Certificate	No.	5,	for	1000	shares.
"	"	6,	"	1000	"

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Certificate	No.	9,	for	1000	shares.
"	"	10,	"	1000	"
"	"	11,	"	1000	"
"	"	12,	"	1000	"
"	"	507,	"	8887	"
"	"	508,	"	1000	"
"	"	510,	"	3944	"
"	"	550,	"	5500	"
"	"	607,	"	1500	"
				26831	

And defendant alleges on information and belief that this identical stock, or other stock issued for it, constitutes the greater part of the 35,005 shares held in trust by the complainant in this suit, and submits that the same is subject to a trust in its favor to the extent of the liability to it of the said Moore, Cornwall and Bryan.

And defendant further says that by the terms of the first agreement as set forth in said Exhibit B said Moore was to share equally with the said Cornwall in all stock moneys and other things derived from said Planograph Company, and that by the second and third agreements set forth in said Exhibits C and D said Bryan was to participate with them and he and said Moore were to have two-thirds of all said stocks after certain payments.

12. And this defendant further says that the said Pittsburg parties did in fact pay seventy-five thousand dollars ($75,000) for
41 and on account of their said option, but failed to make further payments and allowed the option to lapse; that of said the seventy-five thousand dollars ($75,000) so paid, fifty thousand dollars ($50,000), nominally at least, were expended for the benefit of said Planograph Company, but while for said fifty thousand dollars ($50,000) the Pittsburg parties were allowed only one thousand (1,000) shares of stock, or stock at fifty dollars ($50) a share, the said Cornwall charged up against the Company for and on account of said sum, three thousand (3,000) shares of stock, or stock at $16⅔ a share, and deducted the same from the said 18,000 shares that were to remain for the benefit of the Company in case of the failure of the Pittsburg option, and defendant says that for these 2000 shares said Cornwall and his associates are trustees for said Planograph Company. And this defendant further says on information and belief that the whole amount realized from the sales of

the 15,000 shares remaining of the said 18,000 shares, which sales were conducted under the supervision of the said Cornwall instead of under the direction of the board of directors as they should have been, has not been turned into the treasury of the Company or expended for its use, or if the full amount realized from the sales of such part of said stock as has been sold has been used for the benefit of the Company, then the whole of said stock has not been sold, and it submits that for such stock the said Cornwall and the directors of the Company are accountable as trustees.

And this defendant further says that with the exercise of
42 due care and diligence on the part of the directors and officers of the Company, it believes that a much larger sum could have been realized from the sale of said 18,000 shares than the amount the Company has received therefor.

13. And this defendant says that at the time of the consolidation of the Moore Typewriter and Linomatrix Companies with the Planograph Company, it conveyed all its patents, patent rights, and other assets to said Planograph Company, and for the payment of its debts as well as for distribution to its stockholders it received only stock of the said Planograph Company; that Planograph stock amounting to about 1450 shares for the payment of its (this defendant's) debts was placed in the hands of Russell W. Montague and Henry J. Gensler, both defendants in this suit, but that it has been unable to sell said stock and to discharge its debts owing principally to the obstructive course pursued by the said Gensler acting, as this defendant is informed and believes, largely under the influence of one or more of the officers of said Planograph Company, and that its debts still remain unpaid, and defendant submits that on this ground also, in addition to its right to enforce said consolidation agreements according to their express terms, it has the right as well as the duty to exact from the said Cornwall and also from the other directors of the said Planograph Company a strict accountability for the expenditure of the said 18,000 shares that were to remain for the benefit of the Planograph Company in case of the failure of the Pittsburg option, as well as the right to insist that all money, stock, and other things belonging to that
43 Company shall be collected, and that its assets shall not be wasted, but administered in a businesslike manner.

14. And this defendant further says that of the persons named as defendants in this suit, the following viz: Ernest M. Pease, George R. Cornwall, Charles T. Moore, Henry L. Bryan, Winthrop Pond, James O. Clephane, John H. White, John T. Granger, Rudolph Kauffmann, Richard C. Thompson, Cecil Moore, John D. Morgan, and Henry J. Gensler have been, or are, directors of said Planograph Company, while the defendant Andrew Devine was a director of the Linomatrix Company; that all of the persons abovenamed as directors of said Planograph Company, except Charles T. Moore, Cecil Moore, John D. Morgan, and Henry J. Gensler were directors of that Company in May and June, 1905, that in the latter month, to wit, on or about June 12, 1905, the said Russell W. Montague, Alexander F. Matthews, and Nathaniel Wilson made a

written request on the President and Directors of the said Planograph Company (the said Russell W. Montague having first made a similar request at the annual meeting of the stockholders May 17, 1905), for a detailed account of the said 18,000 shares of Planograph stock that were to remain for the benefit of that Company in case of the failure of the Pittsburg option, a copy of which request is hereto annexed and made a part hereof and marked Exhibit K.

And defendant says that of the directors so notified, the said Clephane and White, as it is informed and believes, wrote letters to the President of the Company or the Board of Directors,
44 making some sort of a protest, or at least asking for information, the exact character of which letters defendant does not know, but that the directors generally, as complainant is informed and believes, claimed that the disposition of said shares belonged to the said Cornwall, the same having been placed in his hands by a former vote of the board of directors or at a meeting of the stockholders, which vote this defendant claims is *ultra vires,* illegal and void, as being without consideration, in violation of contract obligations, and contrary to public policy; and defendant says that so far from calling said Cornwall to an account, the directors permitted him to expend the amount of said 18,000 shares then remaining, viz., 3893 shares, without proper supervision from them; and that for this amount it is claimed that said Cornwall as well as the directors generally are liable to account.

And defendant further says on information and belief that the president of the Company, Ernest M. Pease, had certain agreements or arrangements with the said George R. Cornwall by which he participated in the profits derived by said Cornwall from the said 18,000 shares, and that thereby his personal interest was and is in conflict with his official duties.

15. And defendant further says that by means of the large amount of the said Planograph Company's stock that the said Moore, Cornwall and Bryan wrongfully secured for themselves as aforesaid, they have been able absolutely to control the Company, and to determine its policy; and defendant says that the Company has been
45 managed in the interest of its officers, or some of them, several of whom including the said Moore and Cornwall, have made large sums of money out of the enterprise, while the interests of the stockholders generally have been neglected and disregarded; that excessive salaries have been paid and the Company in other ways mismanaged and its assets wasted; that as particular instances, among others, of this waste and mismanagement, defendant says that from the date of the incorporation of the said Planograph Company, the said Moore and Cornwall have taken salaries never less than $5000 a year, and most of the time at the rate of $6000 a year; that in the beginning before there was any money available for the payment of them, they were allowed to accumulate so that when the Company did receive money, it could be applied to the payment of the salaries in arrears; and further defendant says that for the entire period (with the possible exception of a month or two) during which the said Charles T. Moore was adjudged to be a lunatic by this court,

he was paid a salary at the rate of $6000 a year by said Planograph Company, with full knowledge of the President of the Company and the Board of Directors. In addition to the salaries of $6000 paid the said Moore and Cornwall, the president of the Company, Ernest M. Pease, has a salary of like amount.

And again as showing the reckless and lawless manner in which the affairs of the said Planograph Company have been managed, defendant says that in issuing the said Planograph stock the officers of the Company failed to comply with the revenue laws then in force and did not attach the proper amount of stamps, so that very
46 recently the Company was called upon to pay a large sum to the United States Government for such failure; and defendant avers that this failure to put on the proper stamps was not merely accidental, inasmuch as Henry L. Bryan, the Secretary of the Planograph Company is in the office of the Editor of Laws in the United States Department of State, and as the question of stamping the certificates of stock was brought to the attention of the Planograph Company when this defendant Company and its stockholders received their planograph stock, its (defendant Company's) officers at that time insisting that the stock should be properly stamped.

16. And defendant further says that many of the facts and circumstances on which the allegations herein made are based were not learned until after the suit by this defendant and others against the said Planograph Company, Cornwall, Moore, Bryan, and others, referred to in the plaintiff's bill of complaint, had been instituted in the Circuit Court of Kanawha County, West Virginia, and that then said facts were learned through the disclosures directly or indirectly resulting therefrom.

17. This defendant admits on the allegations set forth in the bill of complaint that the plaintiff is entitled to resign and be relieved of its trust, but it alleges on information and belief that the New York Trust Company has not consented to accept said trust, and further that no other responsible trust company will be likely to accept the same if it has full knowledge of the facts, and in view
47 of all the facts and circumstances hereinabove set forth, including the restraining orders granted by this Court in Equity Suits Nos. 26731 and 26847, referred to in the bill of complaint, which orders still remain in force, and prohibit the removal or transfer of the said 35,005 shares of Planograph stock, defendant submits that the plaintiff can be granted relief and the rights of all parties protected only by the appointment of a receiver for the said 35,005 shares of Planograph stock affected by said trust, who shall hold said stock subject to the orders of this Court until the rights of the various claimants thereto have been settled and determined.

[SEAL.] THE MOORE PRINTING TYPEWRITER COMPANY,
By RUSSELL W. MONTAGUE, *Its President.*

CHARLES A. KEIGWIN,
GEORGE P. MONTAGUE,
Attorneys for Defendant Company, and of Counsel.

Russell W. Montague, being duly sworn, says that he is the President of The Moore Printing Typewriter Company, as well as one of the defendants in the above entitled cause, that he has read the foregoing answer of the said Company, and that the facts and allegations therein contained are true except in so far as they are therein stated to be on information and belief, and that so far as they are therein stated to be on information and belief, he believes them to be true.

RUSSELL W. MONTAGUE.

48 Subscribed and sworn to before me this 31st day of August, 1907.

[SEAL.] W. B. HINES,
Notary Public, Greenbrier County, West Virginia.

DISTRICT OF COLUMBIA, *City of Washington, ss:*

George P. Montague, being duly sworn, says that he is the Vice President of the Moore Printing Typewriter Company, as well as one of the defendants in the above entitled cause, that he has read the foregoing answer of the said Company, and that the facts and allegations therein contained are true except in so far as they are therein stated to be on information and belief, and that so far as they are therein stated to be on information and belief, he believes them to be true.

GEORGE P. MONTAGUE.

Subscribed and sworn to before me this 3d day of September, 1907.

[SEAL.] CHARLES LOWELL HOWARD,
Notary Public, D. C.

49 EXHIBIT A.

Office of George Prescott Montague, Counsellor-at-Law, McGill Building, 908 G Street N. W.

WASHINGTON, D. C., *May* 22, 1906.

National Safe Deposit, Savings and Trust Company of the District of Columbia, Washington, D. C.

GENTLEMEN: Referring to the thirty-five thousand and five (35005) shares of stock of American Planograph Company held by your Company as trustee, and voted by it through its agents at the Annual Meeting of the stockholders of American Planograph Company, held at Charlestown, West Virginia, May 16, 1906, you are hereby notified that a large part of said thirty-five thousand and five (35005) shares of stock is claimed by the undersigned to be subject to a trust for them, and that suit is now pending in the Cir-

cuit Court of Kanawha County, West Virginia, to determine, among other things, the ownership thereof, being a suit in equity brought by

THE MOORE PRINTING TYPEWRITER COMPANY, RUSSELL W. MONTAGUE and GEORGE P. MONTAGUE, for Themselves and Others, Plaintiffs,

vs.

AMERICAN PLANOGRAPH COMPANY, GEORGE R. CORNWALL,
50 BESSIE P. CORNWALL, CHARLES T. MOORE, RICHARD C. THOMPSON, Individually and as Committee of said Charles T. Moore, an Adjudged Lunatic; HENRY L. BRYAN, MARIAN BRYAN, WINTHROP POND, JOHN H. WHITE, RUDOLPH KAUFFMANN, JOHN T. GRANGER, Defendants,

and you are hereby cautioned against transferring said stock or parting with the possession of it, as the undersigned claim that such stock being subject to a trust in their favor, you will be liable, after this notice, to account to them for such portion thereof as may be adjudged in said suit, or otherwise shown, to be their property, or property in which they, or any of them, have a beneficial interest.

Particular reference is made to certificates issued for a block of about twenty-seven thousand (27,000) shares of stock of American Planograph Company, formerly represented by the following certificates, viz:

Certificate No.	9, Bessie P. Cornwall	1000
" "	10, " "	1000
" "	11, Marian Bryan	1000
" "	12, " "	1000
" "	13, Henry L. Bryan	5
" "	14, " "	5
" "	262, Chas. T. Moore	65
" "	265, " "	40
" "	550, " "	5500
" "	507, Winthrop Pond	8887
" "	607, " "	1500

51 Also shares supposed to be carried on the books of the Company until very recently in the name of Charles T. Moore, being stock issued for Cert. No. 5, 1000 shares
No. 6, 1000 shares
" 510, 3944 shares
" 508, 1000 shares
—— 6944

26946

The certificates now representing these twenty-six thousand nine hundred and forty-six (26946) shares can easily be ascertained by reference to the books of the Company.

The amount of stock of American Planograph Company in controversy in the above mentioned suit is more than thirty thousand (30,000) shares.

Yours very truly,

THE MOORE PRINTING TYPEWRITER COMPNAY,
By RUSSELL W. MONTAGUE,
Its President.
RUSSELL W. MONTAGUE AND
GEORGE P. MONTAGUE,
For Themselves and Others Stockholders and Creditors of The Moore Printing Typewriter Company as well as for Other Stockholders of The Linomatrix and American Planograph Companies.

May 22, 1906.

Copy of the within notice served on the National Safe Deposit Savings and Trust Company of the District of Columbia by leaving copy with Thomas R. Jones, President of said Company this day at 1:45 P. M.

LAWRENCE HUFTY.
FRANCIS HUFTY.

52 EXHIBIT B.

Filed September 3, 1907.

NEW YORK CITY,
STATE OF NEW YORK, *January* 18*th*, 1900.

This contract made and entered into the day first above written by and between Geo. R. Cornwall, of Mt. Vernon, in the State of New York, and Charles T. Moore, of the City of Washington and District of Columbia:

Witnesseth: That the said Cornwall has this day contracted with the said Moore for his professional and technical services for the following purposes:

1st. To prepare applications for letters patent for certain inventions of said Cornwall and to prosecute the same to a final issue before the United States Patent Office.

2d. To inspect, supervise and advise all employés of said Cornwall engaged upon the work forming the subject-matter of said applications.

3d. To advise said Cornwall as to the purchase of other inventions and patents and make examinations of the records of the United States Patent Office in relation thereto.

4th. To assist said Cornwall in promoting a Company to develop his, said Cornwall's, inventions and to procure the necessary capital therefor.

5th. To bring and prosecute any and all suits in law or equity that may be necessary to defend or assert said Cornwall's
53 rights under said patents, or to assist other counsel in so doing.

And it is further agreed, that if the said Moore shall be instrumental in disposing of not less than one thousand two hundred shares, (1,200) of the stock in the Company agreed to be promoted at not less than twenty dollars ($20) per share, after such stock shall be ready for issue, then the said Cornwall agrees to divide with the said Moore equally all that he, the said Cornwall, shall receive from the promotion of said Company, either in stock, money, royalties, or other considerations of whatever nature.

And it is further understood and agreed that when the said Moore shall have disposed of, or been instrumental in having one thousand two hundred shares of said stock disposed of at twenty dollars per share, as herein referred to, that then and in that event, he shall be entitled to receive the consideration above mentioned and that in the event of his death or disability the same shall go to his wife, heirs or legal representatives, and that if said Moore continues to serve the said Cornwall or the Corporation to be chartered and organized, he shall receive for his services such compensation as may be agreed upon, but in no case shall such compensation be less than Five Thousand Dollars ($5,000) per annum.

It is further understoqd and agreed that nothing in this contract obligates the said Moore to invent for the said Cornwall or the Corporation to be chartered and organized, or to disclose to them or either of them any invention or inventions he has heretofore made or to affect in any way the title that any person, persons or corporation may have heretofore legally acquired, or to do any act in contravention thereof; but he does obligate himself to give his time and energies in promoting the interests of said Cornwall and not to use his time and services in inventing for himself or others during the time above stated.

GEORGE R. CORNWALL. [SEAL.]
CHAS. T. MOORE. [SEAL.]

Witness:
CECIL H. MOORE.

54 JULY 31ST, 1902.

Mr. Moore having been instrumental in disposing of the stock as above provided for and having complied with the provisions of this agreement is entitled to the full consideration.

GEO. R. CORNWALL.
CHAS. T. MOORE.

Witness:
CECIL H. MOORE.

STATE OF NEW YORK, *City and County of New York,* ss:

This is to certify that I, Chas. Clyde Wall a Notary Public for above mentioned State and County have compared the within in-

strument word for word with the original document and have found this copy to be identical with the original, I hereby also certify that I have compared the signatures on the original instrument with the signatures on file in the Second National Bank of the City of New York and to the best of my knowledge and belief they are written by the same people and are undoubtedly genuine

Witness my hand and official seal this 11th day of August 1904

[OFFICIAL SEAL.] CHAS. CLYDE WALL,
Notary Public No. 17, New York County.

Commission expires Mar. 30, 1905.

EXHIBIT C.

This Memorandum of an Agreement made this — day of ——, 1900, *witnesseth:*

That George R. Cornwall, Charles T. Moore and Henry L. Bryan, have this day mutually covenanted and agreed each with the other, as follows:

Whereas the said Cornwall is the inventor of sundry improvements in and relating to the art of planographic printing, and of methods and processes for forming planographic designs, and means for transferring the same to printing surfaces, and for printing from such transfers, and has also made certain improvements in and relating to the plates, forms and presses used in printing from planographic designs, and

Whereas Charles T. Moore is also the inventor of certain machines for printing and justifying the printed lines, as well as of machinery for perforating composing ribbons and ribbons for justifying, which inventions are adapted to be used in planographic work and for preparing letter press designs for inkless or chemical printing, and

Whereas the said Moore by reason of enforced litigation to protect his interest in his said inventions cannot obtain the capital necessary to perfect the same or to enable him to make further inventions and improvements and reduce the same to practical operation whereby they may become profitable to himself and useful to the public; and

Whereas the said Cornwall is satisfied that if the said Moore should reduce his inventions to practice and obtain the capital and legal redress he is seeking it would greatly affect the value of his Cornwall's inventions.

Now, therefore, it is mutually agreed by and between the said Cornwall and Moore that it is greatly to the interest of each that one alone should devote his time to working out the inventions, and that the other should give such advice and counsel as his long experience and intimate knowledge of the business will enable him to do; and to this end it is agreed that the said Cornwall is to devote his time to inventing and constructing machines for producing the planographic designs and the methods, processes and appliances for transferring and printing or reproducing the same, while the said Moore is to use his knowledge and experience in assisting the said Cornwall to obtain good and valid patents for his, Cornwall's, in-

ventions, and is not to use the knowledge *he* obtains from the said Cornwall to make inventions of his own, but is to give said Cornwall the benefit of all ideas that may occur to him while preparing or
56 assisting in the preparation of the specifications and claims for the applications for letters patent filed by the said Cornwall. The said Moore is to further assist the said Cornwall in raising capital to develop and market the inventions, and to assist in defending them against infringement and litigation. And it is especially understood and agreed that nothing herein contained shall require the said Moore or the said Cornwall to convey any patent or property, or to render any service for which they are at present legally bound to any other person or corporation. This agreement being intended to enable the said Moore to receive compensation for his personal services, intimate knowledge and long experience and to use the same in the interest of the said Cornwall, and not in promoting his own inventions in opposition thereto and to enable the said Cornwall to realize on his inventions without threatened competition.

And whereas Henry L. Bryan has aided and assisted the said Cornwall and Moore in organizing the American Planograph Company, and has spent large sums of money in assisting them to take the preliminary steps prior to presenting the enterprise to Capitalists and has devoted much time and given his legal services in furtherance of the enterprise,

Now, therefore, it is agreed by and between the said George R. Cornwall, Charles T. Moore and Henry L. Bryan for and in consideration of the services herein recited as well as other valuable considerations moving them and for the further sum of one dollar paid by each of the parties to one another, the receipt whereof is hereby acknowledged. That they shall share equally in all the proceeds and benefits arising from the promotion, introduction and sale of the said inventions and patents or the stock of the Company organized to develop the same, except as hereinafter provided as to George R. Cornwall and Charles T. Moore. And in futherance of this agreement it is understood that the said Henry L. Bryan is to receive 14,995 shares of the full paid Capital stock of the American Planograph Company which shares are to be held by the said Bryan in trust for the following purposes, to wit:

Nine shares to Edward C. Miles; nine shares to George
57 Snider; nine shares to Charles Miles; nine shares to Guy Rodman; nine shares to Mr. Franconi; and one hundred shares to Winthrop Pond.

Two hundred and fifty shares are to be sold at ten dollars per share, to provide a fund of two thousand five hundred dollars ($2,500.00), which fund is to be used as follows:

One thousand dollars is to be paid to George R. Cornwall to enable him to exhibit his machines, methods and processes in and relating to Planographic printing, and one thousand dollars is to be paid to Charles T. Moore for aiding such exhibitions, and five hundred dollars is to be paid to Henry L. Bryan for like services.

Three thousand shares are to be sold at not less than ten dollars

per share which is to be expended as follows: First, to pay to George R. Cornwall and Charles T. Moore each the sum of seven thousand five hundred dollars in cash and a salary of one hundred dollars per week; to pay for such help and assistance as they may require for tools, appliances and materials; for office and shop rent and for traveling and other expenses that may be necessary for the mutual interests of all.

And three thousand shares are to be sold for not less than one hundred thousand dollars, which sum is to be paid to George R. Cornwall and Charles T. Moore in equal moi-ties, or to such assignee, or agent as they or either of them may name or appoint to receive their proportion of said sum. And after the issue and delivery of the above named stock the remaining shares are to be issued to George R. Cornwall, Charles T. Moore and Henry L. Bryan in an equal number of shares to each. And it is further agreed that until the stock of the American Planograph Company held by Henry L. Bryan in trust shall have been divided in accordance with the terms of the trust, the said Bryan, trustee, shall vote the same one-third as directed by said Cornwall and one-third as directed by said Moore.

It is further understood and agreed that the said George R. Cornwall is to demand a royalty upon all patented machines and
58 processes in or relating in any way to planographic printing and that he is to divide the same equally with the said Moore. And that if the Capital Stock of the American Planograph Company shall be increased, or preferred stock shall be issued or by any means the corporation by its own act issues other or increased securities the corporation is to make over to the said Cornwall and Moore enough of said securities to keep their holdings in the Company equal to what it may be at the time of such issue or increase or make them other compensation therefor. And it is further understood that the said Cornwall will upon demand of said Moore give him a written order upon the American Planograph Company for his, the said Moore's part of such royalties, or increase of stock, and that before the control of the Company passes from the said Moore, Cornwall and Bryan they will have the Company accept such order, and ratify the same.

It is further understood that all inventions of said Cornwall of whatever nature if they relate to the art of printing or typewriting are to be assigned to the American Planograph Company unless *all parties* to this agreement are satisfied to make other disposition of the same. And that the patents for the same taken in all foreign countries are to be assigned to Henry L. Bryan, Trustee, for the benefit of George R. Cornwall, Charles T. Moore and said Bryan, each to have an equal interest in the same and to contribute equally to the expense of procuring the patents and promoting the introduction of the inventions abroad, or selling the same.

EXHIBIT D.

This supplementary agreement by and between George R. Cornwall, Charles T. Moore and Henry L. Bryan, Witnesseth:

That of the money received from Andrew Devine, Geo. R. Cornwall is to have $3,000 and Chas. T. Moore is to have $3,000, and that each is to pay Henry L. Bryan $500; $3,000 is to be
59 deposited in the Corn Exchange Bank to the credit of George R. Cornwall and Cecil H. Moore, jointly, for the expenses of shop patents, salaries, etc., and $3,000 is to be deposited to the joint account of Geo. R. Cornwall, Chas. T. Moore and Henry L. Bryan in the Second National Bank of New York;

That of the stock remaining after the sale of 1,500 shares to Andrew Devine and the deposit of 6,500 shares for delivery to him upon the payment of $270,000, there shall be delivered immediately to Geo. R. Cornwall, Chas. T. Moore and Henry L. Bryan 1,000 shares each, and to Chas. T. Moore five shares in addition;

That of the moneys received from the sale of the remaining stock and also from the 6,500 shares issued Andrew Devine, and held in escrow, there shall be paid to Geo. R. Cornwall $100,000, to Chas. T. Moore $100,000 and to Henry B. Bryan a sum sufficient to make with what he has already received, $5,000, and the balance remaining after such distribution shall be divided into three equal parts so that Geo. R. Cornwall, Chas. T. Moore and Henry L. Bryan shall each receive one-third thereof;

That all moneys hereafter received from the sale of stock shall be deposited in the Second National Bank of New York, to the joint account of George R. Cornwall, Chas. T. Moore and Henry L. Bryan.

December 12th, 1900

CHAS. T. MOORE.
HENRY L. BRYAN.
GEO. R. CORNWALL.

Witness:
CECIL H. MOORE.

60 EXHIBIT E.

Extract from the Minutes of the Meeting of the Stockholders of The American Planograph Company, Held March 12, 1900.

"Thereupon, a proposition from George R. Cornwall, offering to sell, assign and transfer to this Company, all his right, title and interest in and to his inventions and patents, together with any improvements thereon, for exclusive use in the United States and Canada, relating to certain methods of surface printing, together with a certain apparatus for printing lines of characters by means of a perforated tape of paper, the mechanism of same to be operated by a key board for effecting the perforations, as set forth in the offer of George R. Cornwall, a copy of which is as follows, viz:

MT. VERNON, NEW YORK, *March 12th*, 1900.

To the American Planograph Company.

GENTLEMEN: In connection with certain discussions and propositions made between members of your company and myself, I beg to submit the following proposition for your consideration, namely: I will sell to your company the following inventions and patents relating to printing.

1st. Patent No. 607,915, issued July 26th, 1898, for process of intaglio printing.

61 2nd. Patent No. 614,090, issued Nov. 15th, 1898, for printing machines.

3rd. Patent No. 630,664, issued August 30th, 1899, for methods of making printing designs.

4th. Patent No. 643,372, issued February 13th, 1900, for printing machines.

5th. Patent No. 643,892, issued February 20th, 1900, for methods of forming acid resistant printing designs.

6th. Application for U. S. Patent. Serial No. 694,360, for improvements in printing plates.

7th. A proposed design producing apparatus which automatically prints and justifies lines of characters by means of a perforated tape of paper, and the mechanism operated by keyboard for effecting the perforations, and upon which apparatus it is intended to make applications for patents, together with all future improvements on all said inventions and patents, for use within the United States and Dominion of Canada, and I agree to make application for Canadian Letters Patent on the foregoing inventions and those covered by the United States Letters Patent, whenever requested so to do by your Company; your Company to pay all fees and expenses connected therewith.

These patents and inventions, together with improvements thereon, are offered you for the sum of $1,499,900, payable as to $400, in cash, and the balance, viz: $1,499,500, payable to me in 14,995 shares of the capital stock of your company, at its par value of $100 per share, and as a further consideration for such

62 transfer of patents and inventions to your company, its successors, assigns, or licensees, ten per cent. of all gross amounts of money or other consideration, received by it, from the sale, lease, rent, license or otherwise, of any of the patents, processes, methods, mechanisms, or from the business connected therewith, or pertaining thereto.

Upon the notification of the acceptance of this proposition by your company, the assignments of the patents, already issued and the applications for the patents will be properly executed and transferred to your company, with such other papers as may be necessary to fully vest or complete title in such patents and inventions to your company.

Very *respectively*,

(S'd) GEORGE R. CORNWALL.

The foregoing proposition from George R. Cornwall was thoroughly considered, and after due discussion, on motion of Mr. Snyder, seconded by Mr. Rodman, it was unanimously

Resolved, That the offer of George R. Cornwall, above set forth, be and the same is hereby accepted, and the proper officers of this company are hereby authorized and directed to pay to said Cornwall the sum of $1,499,900, in the manner set forth in the foregoing offer of George R. Cornwall, whenever in their judgment, the said Cornwall shall execute the proper papers transferring to this company title to the aforementioned Letters Patent of the United States and the U. S. application for patent, together with an assignment to this company of the said Cornwall's right, title and
63 interest for the United States and Canada, in and to the apparatus described as article 7th in the offer of said Cornwall, above set forth."

64 EXHIBIT F.

Confidential.

"THE DEER'S HEAD INN,"
ELIZABETHTOWN, N. H., *Sept.* 19, 1900.

MY DEAR MR. MOORE:

Thanks for your favor of the 17th. I am glad to hear that you are back in Washington again and that you have had a very pleasant vacation. You needed a long rest very badly when you left Washington, and now, that you have had it, I hope you are feeling the greatest benefit of it.

Before I left Washington I heard that you were stopping at the United States Hotel, Saratoga. So when I reached New York on my way up here I telegraphed you to meet me on the arrival of the train, but not meeting you there I took it for granted that you had departed for other green fields and pastures new.

Just before leaving Washington I got some very important information about the aluminum business, which, if there was anything in it I wanted you to know, so that you might properly safe-guard yourself in any agreement you might make in regard to your invention. I also wanted to tell you that Mr. McLean would not return until the latter part of this month, in order that you might not work yourself to death in an attempt to get your matter ready by his return, which was to have been the latter part of August. Now that you are in Washington I suppose you have seen Scott Towers and that he has imparted to you the information he has concerning the ownership of certain aluminum patents. If not, see him and speak to him on the subject. If his information is correct, the only real valuable thing in connection with the enterprise would be your own invention, and I wanted you to know that fact before you had bound yourself hand and foot.

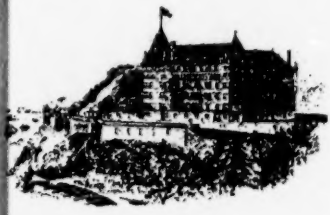
I am very much pleased to hear that you will be able to make a good showing to our parties early next month. I am with you in the suggestion that if they are not willing to take hold of the matter, we can very readily get some others who will be glad to do so.

I leave here on Tuesday next and will probably be in Washington by Friday or Saturday of next week, when I hope to see you and have a good talk with you.

Very sincerely yours, H. J. GENSLER.

Chas. T. Moore, Esq., Washington, D. C.

65 EXHIBIT G.



Chateau Frontenac.

Quebec. Canada

July 12th 1900

From Cornells last letters it is quite evident that I will have to work with Gabbon and a draftsman after next week how long the job will take I cannot say possibly ten days possibly 30 days. I am going to have Gabbon take the machine a part and explain it to the draftsmen, and have the latter draw as the machine is reassembled before his eyes making such changes as I can readily suggest, the object of any changes at this time for patent purposes is to make the Cornwall machine look as little like the Moore model as possible yet cover all the patentable features in a practicable way. this I expect to do by Aug. 1st then I hope to have Gleason wherever I am sent to get out the perforator & justifyer and put the Cornwall printer in practicable shape for Gabbon by Sept 1st Then I can tackle Forman about Oct. 1st for big money. and go for the European patents.

66 EXHIBIT H.

[Envelope addressed to Mr. Charles T. Moore, Hotel Frontenace, Quebec.]
[Return card in corner: G. R. Cornwall, Mt. Vernon, New York.]
[Postmarked Station H, New York, N. Y., Jul- 9, 5 P. M. 1900.]
[Back of envelope postmarked Quebec, Canada, C., J'y 10, '00.]

38 East 9th St
New York July 9th 1900
Monday P M

My dear C. T

Well you are hard to locate I tried to find you at the Prince Edwards Island address you sent. from Boston At least I tried to telegraph to you there and to send a letter to you there but both of the Telegraph Cos & the Post Office dept. said they couldnt find any such station or P. O as Grand Frecadie Beach on the Island so I saved my money & didn't telegraph.

Then your telegram came Friday from Fabyans White Mts. & I immediately telegraphed to you. Later your letter came from there.

I suppose you are now somewhere in touch with Quebec & according to latest word from you I telegraphed to you there Care Frontenac Hotel this morning & will send this to the same address

Now for the Business Situation. Stevens turned up O. K. with his 2300 divided as follows—

Certificate	No. 64.	W. G. Stevens 10 shares
"	No. 65.	S. G. Stevens 34 "
"	No. 66.	Florence M. Bodine 14"

He had checks aggregating 2,308 33/100 Exchange on one check cost 33c so net amt. was $2,308. One check for a thousand. was improperly endorsed by his sister so he had to return it to her for correct endorsement. It is due here Wednesday A M.—(delay because she is camping out) Money is in his bank–so its OK

67 I banked the remaining $1,308 in Produce Exchange Trust Co, to Cr Henry L. Bryan Trustee

This morning Mr. A. D. Puffer. of Boston was in with Kerr. (He is the head of the Soda Fountain trust & is Kerrs Pa in law). He agreed to take 50 shares. & instructed me to mail it to him at Boston today. & when he receives it Tuesday A M. he will send a check payable to Henry L. Bryan Trustee Amt. to be $3.750— He is several times a millionaire He said perhaps when he got to Boston he would send for 50 shares more

Now in regard to others—We have confined ourselves almost entirely to A Mr Drake. who has given us reason to believe he would take 500 shares. The hang is in his partner Dinwiddie Nothing is settled one way or the other but they have occupied all our time for the last week—Then my sisters sickness has taken me to

Brooklyn daily She is yet hanging between life & death—but now the chances in her favor are increasing a little.

Another thing has made work almost impossible the intense heat. up in the 90s for about a week—& the humidity horrible. This—with the 4th of July has really stopped business—People havnt ambition enough to do more than live. & nothing interests or enthuses them Its wasting good ammunition to shoot at a man when he is almost dead from heat & humidity

Kerr goes away for two weeks this Saturday He, like all of us, is tired out with the intense heat. I must admit I am pretty rocky myself & cant half do my work justice.

We will do our best to clean up all we can this week before Kerr goes.—The amt we can be sure of is the 1308. banked.—Stevens remaining 1000. & Puffers $3750. and after Aug 1st Crawfords 3,750—in all $9,808. This should carry us through even if no more comes in.

Now I am going to make a suggestion in line with yours—Lets shut up the shop at the end of this week.—Have Walter with the Mechanical & Patent Office draughtsmen join you at some convenient place & get everything ready to make the Domestic & Foreign patent applications as early as possible

68 The hang with any good big trade is on the patents If we have the applications in we can make a big go in any one of several directions with McLean or others as we may elect If the McLean deal should fall. I would suggest that we increase Our Capital to say $5,000,000—the limit in West Va.—& then with our patent applications filed we can sell all the stock we want to dispose of at 50c at least or make a big deal.

Now about the Foreign patents. A friend of mine—a German American. A Mr. Adler. wants to handle the Continental patents. He stands ready, he assures me, to put up with us—say $15,000 for an option for 6 months. from time we turn over to him a little machine to take abroad—to show his parties. We to put up the patents in "escro subject to his order when he pays us our price We havnt got as far as price yet I wanted to hear from you first. The territory he wants to cover is the Continent of Europe. not England or her Colonies. What price would you say? Of course the $15,000 is forfeited to us if he doesnt make the sale Here again we must have patent applications filed or ready to file before we can close a deal. He is a straight reliable man & means business

Now in regard to England and her Colonies. A friend of Kerrs, A Mr. Greig—the American representative of Pearson, wants to handle & through Pearson—He offers to have Pearson, or Carey his partner come over here & see it on, say Sept. 1st or when we elect & says they will put up, say $20,000 to $25,000—or thereabouts. for an option to buy the English & Colonial rights wants six months time on option. What say you. What price shall we ask them?

There again it is necessary to have English and Colonial patents ready to file—

Now old man. wouldn't it be a good plan for us to devote our

time between now and Sept 1st to getting patent applications &c in order? Also let Walter have his Vacation & all of us get thoroughly rested for the fall campaign? I ought to have some rest myself, the Doctor tells me.

69 The $9,808—will make things perfectly easy until Sept. 1st at least & with our affairs in good shape, by good shape I mean patent applications all ready to file all over the world. can immediately raise from $40,000 to $50,000 on the English & European rights & then, if we want to, can hold the American Co. for ourselves. until its bigger.

I carry out your instructions carefully as to exposing the machine & the boys are both posted as to the importance of letting no one in on any pretext

Now old man let me hear what you think is best to do If you can suggest anything different from what I propose I'm agreeable—always—as you know—We are in this fight for a fortune & if we stick to it, we will win for a dead certainty.

I don't know where Henry is—I heard from him last Monday, the 2nd from Medfield Mass. & nothing since He said he was going from there to Cherry Valley—where that is I don't know—& then on the 5th would be in Milford—I sent a letter to Milford enclosing stock certificates for his Signature on the 5th but they havnt turned up here yet Fortunately Stevens, was willing to take my receipt in place of the stock itself

I will telegraph there tonight & see if I can. find him Have just as good a time as you can & get that think trap in A No 1. order. I wish I were with you—from the bottom of my heart—I suppose you will come back to some cool place near N. Y. where Gribben & the draughtsmen can join you. I will want to run up & see you too. Don't try to come to the city.—It is so hot that it might put you out again & you can't afford that, of all things. I have just observed the size of this letter, but it will have to go. Instead of the daily notes I expected to send, as I had no address, I give every thing for the week in one letter.

With kindest regards,
Ever your
GEO R CORNWALL.

To
Chas T. Moore Esq
Hotel Frontenac
Quebec

70 EXHIBIT I.

HARTFORD, CONN., *Aug. 10th*, 1900.

Mr. Chas. T. Moore, United States Hotel, Saratoga Springs, N. Y.

DEAR MR. MOORE:

Your telegram & letter duly received very glad to hear from you I am very glad to learn that you will send for me *so* soon.

Aug 10th is the date agreed upon by Mr Corwall and I and

when I saw him last Monday he told me the contract would begin with that day so I am sending with this the work I have done today of course I could go right ahead and design mechanism complete to accomplish the desired results but I only done this for fun because I have to do something I can't be idle. You can read it then laugh and throw it away but it is all new I never saw anything like it except your machines. Please send transportation expenses when you want me and I will wire you the train to expect me on Mrs G.—can stay here until we are permanant but I would like to have her with me.

We are all well but its mighty hot here Trust this finds you well and Mrs Moore also. I am ready to come at any time:

I am very respectfully at your service.

RALPH A. GLEASON,
64 *Russ. St., Hartford, Conn.*

71 EXHIBIT J.

This indenture, made this 24th day of May, 1901, between "The Moore Printing Typewriter Company," of West Virginia, of the first part, and Charles T. Moore and Russell W. Montague of the second part.

Whereas, at a meeting of the Board of Directors of the said "The Moore Printing Typewriter Company," held at the office of the said company in Washington City, District of Columbia, on the 29th day of April, 1901, it was resolved that the said Company should sell, transfer, and assign, unto Charles T. Moore and Russell W. Montague all inventions and patent rights owned by the said Company, together with all machines, models, and processes, and all other property and rights of whatever description, owned or controlled by the said Company, upon certain terms and conditions therein set forth;

And whereas, at the annual meeting of the stockholders of the said "The Moore Printing Typewriter Company," held on the 14th day of May, 1901, at Charles Town, Jefferson County, West Virginia, pursuant to due notice, the said resolutions which *has* been so adopted by the Board of Directors were ratified and confirmed by a vote of five thousand seven hundred and fifty-five (5,755) shares in the affirmative, as against five hundred and twenty-six (526) shares in the negative, the said five thousand seven hundred and fifty-five shares amounting to over three-fourths (¾) of all the outstanding stock of the said Company;

And whereas, it was further resolved at said stockholders' meeting, by the same vote, that the President and Secretary of the said Company should convey and transfer unto Charles T. Moore and Russell W. Montague, by proper and sufficient instrument, all the property and rights of the said Company, as specified in said resolutions of the Board of Directors, and that the seal of the Company should be affixed thereto, in order that the said Charles T. Moore and Russell W. Montague could carry out all of the provisions of the aforesaid resolutions;

Now, therefore, this instrument witnesseth: That the said party of the first part, in consideration of the premises, and of the sum of ten (10) dollars to it in hand paid at and before the sealing
72 and delivery of this instrument, the receipt whereof is hereby acknowledged, and in further consideration of certain things to be done and performed by the said Charles T. Moore and Russell W. Montague, specified in the said resolutions, doth grant, convey, transfer, set over, and assign, absolutely, and without qualification, all inventions, and patent rights covering inventions, owned by the said "The Moore Printing Typewriter Company," and especially, all interest or interests in inventions and patent rights that the said Company may control in and relating to typewriting machines, matrix making machines, typesetting and matrix assembling machines, and all machines, methods, and processes for producing printing surfaces whether in relief, intaglio, or planograph form, and all inventions in and relating to the subject-matter of such machines, methods and processes, whether for the reading of proof, justifying, or the preparation of automatic composers or controllers, or other auxiliaries intended for use in the production of print or printing surfaces, and, in particular, the following patents, viz:

No. 419,864, dated January 21, 1890, issued to Charles T. Moore, of Washington, District of Columbia for typewriting machine, and No. 549,523, dated November 12, 1895, issued to Charles T. Moore, assignor, of Washington, District of Columbia, regularly assigned to the said "The Moore Printing Typewriter Company," of West Virginia, together with all machines, models, and drawings, and all other property and rights, of whatever description, owned or controlled by the said "The Moore Printing Typewriter Company."

Witness the following signatures and seal.

THE MOORE PRINTING TYPEWRITER COMPANY,
By RUSSELL W. MONTAGUE, *Its President.*
R. K. CAUTLEY,
Secretary of The Moore Printing Typewriter Company.

[CORPORATE SEAL.]

Attest:
R. K. CAUTLEY, *Secretary.*

73 DISTRICT OF COLUMBIA, *City of Washington, ss:*

I, Henry L. Bryan, a Notary Public in and for the City and District aforesaid, do certify that Russell W. Montague, the President of "The Moore Printing Typewriter Company," of West Virginia, and R. K. Cautley, the Secretary of said Company, personally appeared before me in my City and District aforesaid, the said persons being personally well known to me, and acknowledged the above writing, and hereto annexed, bearing date on the 24th day of May, 1901.

Given under my hand and Notarial Seal this 27th day of May, 1901.

HENRY L. BRYAN,
Notary Public.

[NOTARIAL SEAL.]

A similar deed, conveying all the property and rights of The Linomatrix Company to the said Charles T. Moore and Russell W. Montague, was duly executed and delivered by the Linomatrix Company at or about the same time.

Whereas Charles T. Moore, of Washington, District of Columbia, did obtain Letters Patent of the United States for improvements in Methods of Printing and in Typewriting Machines bearing date on the 21st day of January, 1890, and the 12th day of November, 1895, which Letters Patent are numbered respectively, 419,864 and 549,523; and

Whereas the said patents were regularly assigned to The Moore Printing Typewriter Company, a corporation under the laws of West Virginia; and

Whereas we, Charles T. Moore of Washington City, District of Columbia, and Russell W. Montague, of Greenbrier County, West Virginia, are now the sole owners of said patents and of all rights under the *name*; and

Whereas the American Planograph Company, a corporation under the laws of West Virginia, is desirous of acquiring the entire interest in the same;

Now, therefore, to all whom it may concern, be it known,

74 That for and in consideration of the sum of ten dollars to us in hand paid, the receipt of which is hereby acknowledged and of certain agreements this day made, we, the said Charles T. Moore and Russell W. Montague have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said American Planograph Company the whole right, title, and interest in and to the said improvements in Methods of Printing and in Typewriting Machines and in and to the Letters Patent therefor aforesaid, the same to be held and enjoyed by the said American Planograph Company for its own use and behoof, and for the use and behoof of its successors and assigns to the full end of the term for which said Letters Patent are or may be granted as fully and entirely as the same would have been held and enjoyed by us had this assignment and sale not been made.

And the said Charles T. Moore and Russell W. Montague for the aforesaid consideration do grant, convey, set over and assign the whole right, title and interest absolutely and without qualification in and to all inventions and patent rights owned by them for the United States relating to the matters herein set forth whether herein specified or not and especially interests in the inventions and patent rights they may now control in and relating to Typewriting Machines, Matrix-Making Machines, Typesetting and Matrix-Assembling Machines, and all machines, methods and processes for producing printing surfaces whether in relief intaglio or planograph

forms, and all inventions in and relating to the subject-matter of such machines, methods and processes whether for the reading of proof, justifying, or the preparation of automatic composers or controllers, or other auxiliaries intended for use in the production of print or printing surfaces, together with all machines, models and drawings and all other property and rights of whatever description now owned or controlled by the said Charles T. Moore and Russell W. Montague, relating to the matters herein set forth.

75 *In testimony whereof,* we have hereunto set out our hands and affixed our seals in the City of Washington, District of Columbia, this first day of June, A. D. 1901.

CHARLES T. MOORE. [SEAL.]
RUSSELL W. MONTAGUE. [SEAL.]

In presence of
J. K. M. NORTON.
R. B. H. LYON.

DISTRICT OF COLUMBIA, *City of Washington, ss:*

I, R. B. H. Lyon, a Notary Public in and for the City and District aforesaid, do certify that Charles T. Moore and Russell W. Montague personally appeared before me in the City and District aforesaid, the said persons being well known to me, and acknowledged the above writing bearing date on the first day of June, 1901.

Given under my hand and Notarial Seal this — day of June, 1901.

R. B. H. LYON,
Notary Public.

This Agreement, made this first day of June, nineteen hundred and one, by and between the American Planograph Company, a corporation chartered and organized under the laws of the State of West Virginia, and Charles T. Moore, of Washington, D. C., and Russell W. Montague, of Greenbrier County, West Virginia.

Witnesseth, That the said Company for and in consideration of the sum of $10.00, lawful money of the United States, to it in hand paid, the receipt of which is hereby acknowledged, and of an assignment made to it by the aforesaid Moore and Montague, bearing date June 1st, 1901, whereby certain patent rights and other property were conveyed to it, does hereby covenant and agree as follows:

That the said Company will, within a reasonable time, increase its capital stock to 100,000 shares of the par value of $100 per share, and that immediately upon making such increase, it, the said

76 American Planograph Company, will, in accordance with certain resolutions passed by the Board or Directors of The Moore Printing Typewriter Company, which resolutions were adopted, ratified and confirmed by the stockholders of the said Moore Company at its annual meeting held at Charles Town, West Virginia, on the 14th day of May, 1901, and in accordance also with certain like resolutions passed by the Board of Directors of the Linomatrix Company, and afterwards adopted, ratified and con-

firmed at a meeting of the stockholders of said Company held at Martinsburg, West Virginia, on the 20th day of May, 1901, cause to be issued and delivered to the said Charles T. Moore and the said Russell W. Montague, 10,000 shares of the Capital Stock of the said American Planograph Company, the same to be fully paid and non-assessable, or the said American Planograph Company will upon the written request of the said Moore and Montague, or their legal representatives, issue the whole or any part of said stock direct to the stockholders of record of the Moore Printing Typewriter Company and the Linomatrix Company, according to the several interests of said stockholders in their respective companies, as shown by the records thereof.

But nothing in this agreement shall be so construed as to prevent the said Planograph Company from changing its present charter or taking a new one under the laws of West Virginia or any other State, either before or after the increase of its Capital Stock as aforesaid.

Witness the following signatures and seals.

THE AMERICAN PLANOGRAPH COMPANY,
CHAS. MILES, *President,*
HENRY L. BRYAN, *Secretary.*

[Corporate Seal.]

Attest:

HENRY L. BRYAN, *Secretary.*

Know all men by these presents, That whereas it is proposed to raise certain capital for the benefit of the American Planograph Company, a corporation of West Virginia, amounting to $300,000, and

Whereas it is proposed with that end in view, to increase
77 the Capital Stock of the American Planograph Company to ten million dollars, or 100,000 shares of the par value of $100 each, of which 40,000 shares is to remain in the treasury for the future use of the Company, or its stockholders, and

Whereas the undersigned now owns a very large majority of all the present stock of the said Company issued to him, full paid and non-assessable, for full consideration, and

Whereas it is proposed to use 36,000 shares of the proposed increased Capital Stock, (exclusive of the 40,000 shares that are to remain in the treasury, as aforesaid,) to raise the said working capital for the said Company, as well as to raise certain moneys upon the said stock for the undersigned, amounting to the sum of $300,000;

Now, therefore, this agreement witnesseth: that the undersigned covenants and agrees, and thereto binds himself, his legal representatives and assigns, that should the negotiation now in progress for the raising of the said sums for the said Company and the undersigned fail to be consummated, in that event, one-half of the said 36,000 shares of stock, to wit, 18,000 shares, as aforesaid, shall remain for the benefit of the said Company. It is expressly understood that should the present negotiation fail, and it be deemed

advisable to raise a less amount of working capital for the said Company, than the said $300,000, so much of the said 18,000 shares as may be necessary, may be used for that purpose, and any of the said 18,000 shares not so used shall be for the benefit of the said Company. It is also understood that the increase in the capital stock of the said Company may be made under a new charter if it may be deemed advisable.

June 1*st*, 1901.

GEO. R. CORNWALL. [SEAL.]

Witness:

HENRY L. BRYAN.

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EXHIBIT K.

WASHINGTON, D. C., MCGILL BUILDING, *June* 12, 1905.

To the President and Directors of the American Planograph Company, 31 East 17th St., New York, N. Y.

GENTLEMEN: Referring to the request made by R. W. Montague, in behalf of himself and other stockholders, at the annual meeting of the stockholders of the American Planograph Company, held at Charlestown, West Virginia, May 17, 1905, for an account of eighteen thousand shares of stock belonging to said Company, to which no response other than formal acknowledgment has been made, the undersigned for themselves and other stockholders now request that the Board of Directors of said Company furnish them promptly with a full and detailed account of said stock, the same being the eighteen thousand shares of stock belonging to the Company, or held for its benefit, referred to in a certain agreement or declaration of trust dated June 1, 1901, and signed by George R. Cornwall, a copy of which is hereto attached; said account to show the number of shares sold, the date of each sale and the authority therefor, the names of the purchasers, and the amount paid in each case, the commissions, if any, paid, and to whom paid, and the balance now remaining for the benefit of the Company, and the present status of such balance, including contracts or options, if any, respecting its sale, to whom given, on what terms, and by what authority.

Also a detailed statement of the expenditures of the sums received from such sales.

R. W. MONTAGUE.
ALEX'R F. MATHEWS.
NATH'L WILSON.

Copy.

Know all men by these presents, That whereas it is proposed to raise certain capital for the benefit of the American Planograph Company, a corporation of West Virginia, amounting to $300,000, and

Whereas it is proposed with that end in view, to increase the Capital Stock of the American Planograph Company to ten
79 million dollars, or 100,000 shares of the par value of $100 each, of which 40,000 shares *is* to remain in the treasury for the future use of the company, or its stockholders, and

Whereas the undersigned now owns a very large majority of all the present stock of the said Company issued to him, full paid and non-assessable, for full consideration, and

Whereas it is proposed to use 36,000 shares of the proposed increased Capital Stock, (exclusive of the 40,000 shares that are to remain in the treasury, as aforesaid,) to raise the said working capital for the said Company, as well as to raise certain moneys upon the said stock for the undersigned, amounting to the sum of $300,000;

Now, therefore, this agreement witnesseth: That the undersigned covenants and agrees, and thereto binds himself, his legal representatives and assigns, that should the negotiation now in progress for the raising of the said sums for the said Company and the undersigned fail to be consummated, in that event, one-half of the said 36,000 shares of stock, to wit, 18,000 shares, as aforesaid, shall remain for the benefit of the said Company. It is expressly understood that should the present negotiation fail, and it be deemed advisable to raise a less amount of working capital for the said Company, than the said $300,000, so much of the said 18,000 shares as may be necessary, may be used for that purpose, and any of the said 18,000 shares not so used shall be for the benefit of the said Company.

It is also understood that the increase in the capital stock of the said Company may be made under a new charter if it may be deemed advisable.

June 1, 1901.

(Signed) GEO. R. CORNWALL. [SEAL.]

Witness:

HENRY L. BRYAN.

80 *Joint Answer of Russell W. Montague and George P. Montague.*

Filed September 3, 1907.

In the Supreme Court of the District of Columbia.

No. 27204.

NATIONAL SAVINGS AND TRUST COMPANY, a Body Corporate, Complainant,

vs.

THE MOORE PRINTING TYPEWRITER COMPANY and THE AMERICAN PLANOGRAPH COMPANY, Bodies Corporate; RUSSELL W. MONTAGUE and GEORGE P. MONTAGUE, for Themselves and Others; ERNEST M. PEASE, HENRY J. GENSLER, WILLIAM C. MAINS, JOHN D. MORGAN, WINTHROP POND, HENRY L. BRYAN, MARIAN BRYAN, WILLIAM M. KERR, ANDREW DEVINE, D. C. MCEWEN, FREDERICK J. WARBURTON, JOHN H. WHITE, ALICE J. WHITE, EMILY J. WHITE, GEORGE OTIS SMITH, HENRY C. CORNWALL, GEORGE R. CORNWALL, BESSIE P. CORNWALL, JAMES O. CLEPHANE, JOHN T. GRANGER, RUDOLPH KAUFFMAN, CHARLES T. MOORE, JULIA B. MOORE and CECIL H. MOORE, and HENRY L. BRYAN, RICHARD C. THOMPSON, WILLIAM C. MAINS, and J. KEITH M. NORTON, Defendants.

Russell W. Montague and George P. Montague, defendants herein, for answer to the Complainant's bill of complaint in the above-entitled cause, say that they are the President and the Vice President, respectively, of The Moore Printing Typewriter Company, another of the defendants herein, and that they are both stockholders of the American Planograph Company, and formerly were stockholders of the said Moore Printing Typewriter Com-
81 pany, and equitable stockholders of the Linomatrix Company, and that they are still interested as stockholders in both said last named Companies; that said Russell W. Montague is trustee of certain shares of stock of the American Planograph Company, to wit, 1444 shares of said stock, held by him for the benefit of the creditors and stockholders of the said Moore Printing Typewriter Company, and that he is also a large creditor of that Company.

For further answer, said defendants Russell W. and George P. Montague adopt the answer of the said The Moore Printing Typewriter Company filed in this cause.

RUSSELL W. MONTAGUE.
GEORGE P. MONTAGUE.

CHARLES A. KEIGWIN,
GEORGE P. MONTAGUE.
Attorneys for Defendants
R. W. & G. P. Montague and of Counsel.

Memorandum.

1907, November 26.—Appearance of A. S. Worthington, for all defendants except Nos. 1, 3 and 4.

82 *Answer of All the Defendants Except The Moore Printing Typewriter Co., Russel W. Montague, and George P. Montague.*

Filed November 26, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27204.

NATIONAL SAVINGS AND TRUST CO., a Body Corporate, Complainant,

vs.

THE MOORE PRINTING TYPEWRITER COMPANY ET AL., Defendants.

For answer to said bill of complaint these defendants say:

1. They admit that the complainant is a body corporate, as alleged.

2. They admit the averments of the second paragraph of said bill of complaint as to the residences of all the defendants, and they admit that the defendants, The Moore Printing Typewriter Company and the American Planograph Company are bodies corporate, and further answering said second paragraph, these defendants say that The Moore Printing Typewriter Company is a body corporate under the laws of the State of West Virginia, and that the defendant the American Planograph Company, is a body corporate under the laws of the same State.

3. These defendants admit to be true the averments of the third paragraph of said bill of complaint, and further admit that
83 Exhibit A to said bill of complaint is a true copy of the instrument in said paragraph referred to.

4, 5, 6, 7 and 8. These defendants admit to be true the averments of the fourth, fifth, sixth, seventh and eighth paragraphs of said bill of complaint.

9. While these defendants, being otherwise advised, cannot admit that the complainant may not without the risk or liability of loss transfer the shares of stock referred to in the ninth paragraph of said bill of complaint to the New York Trust Company, as its successor in the trust referred to in said paragraph, they consent that an order may be made by this Court in this case permitting the complainant to retire and resign from its said trust and surrender the shares of stock held by it to said New York Trust Company, as its successor in the trust, and further agree that by such order the complainant may be instructed by this Court as to the manner and form of transfer by it to its said successor. And in this connection the defendants Julia B. Moore and Cecil H. Moore state that they are the complainants in the respective equity causes numbered 26,739 and 26,847 referred to in said ninth paragraph, and that they unite with the other defendants in consenting to the surrender by the com-

plainant to said New York Trust Company of all the shares of stock referred to in said ninth paragraph, in which they have, or have had, any interest.

JULIA B. MOORE.
84 CECIL H. MOORE.
RICHARD C. THOMPSON.

AMERICAN PLANOGRAPH COMPANY,
ERNEST M. PEASE,
HENRY J. GENSLER,
WILLIAM C. MAINS,
JOHN D. MORGAN,
By A. S. WORTHINGTON,
Their Solicitor.

WINTHROP POND,
HENRY L. BRYAN,
MARION BRYAN,
WM. M. KERR,
ANDREW DEVINE,
D. C. McEWEN,
FREDERICK J. WARBURTON,
JOHN H. WHITE,
ALICE J. WHITE,
EMILY J. WHITE,
GEORGE OTIS SMITH,
HENRY C. CORNWALL,
GEORGE R. CORNWALL,
BESSIE P. CORNWALL,
JAMES O. CLEPHANE,
JOHN T. GRANGER,
RUDOLPH KAUFFMAN,
CHARLES T. MOORE,
HENRY L. BRYAN,
WILLIAM C. MAINS,
J. KEITH M. NORTON,
By A. S. WORTHINGTON,
Their Solicitor.

We, Julia B. Moore, Cecil H. Moore and Richard C. Thompson, on oath say that we have read the foregoing answer by us subscribed; that the statements therein made of our own knowledge are true; and that those stated as upon information and belief, we believe to be true.

JULIA B. MOORE.
CECIL H. MOORE.
RICHARD C. THOMPSON.

A. S. WORTHINGTON,
Solicitor for All the Def'ts Except The Moore Printing Typewriter Co., Russell W. Montague, and George P. Montague.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of November, A. D., 1907.

WILLIAM K. QUINTER,
[SEAL.] *Notary Public, D. C.*

85 *Order for Calendaring.*

Filed November 26, 1907.

In the Supreme Court of the District of Columbia, the 26th Day of November, 1907.

Equity. No. 27204.

NATIONAL SAVINGS & TRUST COMPANY
vs.
MOORE PRINTING TYPEWRITER COMPANY.

The Clerk of said Court will calendar the above entitled cause for hearing at the next term of court upon the bill and answers.

J. J. DARLINGTON,
Solicitor for Complainant.

Motion to File Cross-bill.

Filed December 12, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 27204.

THE NATIONAL SAVINGS AND TRUST COMPANY, Complainants,
vs.
THE MOORE PRINTING TYPEWRITER COMPANY and Others,
Defendants.

Now comes the Moore Printing Typewriter Company, one of the defendants in the above entitled cause, and prays leave to file
86 the cross-bill, herewith presented to the Court, against the complainant in the said cause, and those defendants therein who are named in the said cross-bill, and prays that the Court will make orders in this cause in accordance with the prayers of the said cross-bill which are numbered 4, 5 and 6.

CHARLES A. KEIGWIN,
GEORGE P. MONTAGUE,
Solicitors for the Moore Printing Typewriter Company. Defendant and Complainant as Aforesaid.

Cross-bill.

Filed December 13, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 27204.

THE NATIONAL SAVINGS AND TRUST COMPANY, a Body Corporate, Complainant,
vs.
THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate, and Others, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

The Moore Printing Typewriter Company, a body cor-
87 porate, one of the defendants in the above entitled cause, by leave of the Court first had and obtained, exhibits this its cross-bill against the National Savings and Trust Company, the complainant in the said cause, and against the American Planograph Company, a body corporate, and Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D—— C. McEwen, Frederick J. Warburton, John H. White, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains and J. Keith M. Norton, Defendants in the said cause, and respectfully shows to the Court as follows:

1. The said complainant adopts as part of this cross-bill all the averments made by it in its answer heretofore filed herein to the original bill of complaint, and prays that the same together with the exhibits thereto attached may be read in connection herewith and deemed to be herein repeated as a part hereof.

2. And this complainant further says that by means of the exhibition to sundry persons of the printing machine referred to in the eighth paragraph of said answer, both before and after the changes made for the purpose of disguising it as set forth in said answer, the said Charles T. Moore, Henry L. Bryan and George R. Corn-
88 wall succeeded in selling to divers persons a large amount of the stock of the American Planograph Company by falsely representing that said machine belonged to that Company, when in fact, it was the property of the said Moore Printing Typewriter and Linomatrix Companies, and before said Planograph Company had acquired any title to it.

3. And this complainant alleges, on information and belief, that whereas, by the terms of the consolidation of the three companies, the said Charles T. Moore and Henry L. Bryan were rightfully

entitled to receive about eight hundred and fifty (850) shares of Planograph stock, they did in fact receive from the said George R. Cornwall (to whom all the sixty thousand (60,000) shares of said company's stock had been issued excepting the five (5) incorporators' shares) for and in consideration of their said unlawful agreements and arrangements, with him, and for no other consideration, and without the knowledge of this complainant, a one-half to two-thirds interest in about twenty-eight thousand shares of Planograph stock.

And this complainant further alleges on information and belief that of the fifteen thousand (15,000) shares into which the stock of the Planograph Company, as originally capitalized, was divided, a comparatively small amount was issued or sold for money, so that immediately after the consolidation of the said three companies, when the capitalization had been increased to ten million dollars divided into one hundred thousand (100,000) shares, of which sixty thousand (60,000) were held substantially as follows, viz:

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10,000	shares	by the stockholders of the Moore Typewriter and Linomatrix Companies,
4,000	"	(about) by the old stockholders of the Planograph Company other than the said Moore and Cornwall,
28,000	"	(about) by the said Moore and Cornwall and Bryan,
18,000	"	held in trust by said Cornwall for the Planograph Company in case of the failure of the Pittsburg option, a very large part of which the said Cornwall, Moore, Bryan and Pease have appropriated to their own use.
60,000	shares.	

And this complainant further says, on information and belief, that a large part of the said thirty-five thousand and five (35,005) shares of Planograph stock, now held by the National Savings and Trust Company, is directly derived from the above mentioned twenty-eight thousand (28,000) shares of said stock, as the books of said Planograph Company will show, and that the greater part thereof is still held by the said Moore, Bryan, and Cornwall, or by others of the said defendants in trust for them, or as assignees from them without consideration, or with notice of the fraudulent character of the transactions by which the stock was acquired, and not as *bona fide* purchasers for value without notice, but exactly to what extent said stock is so held, this complainant does not know, and therefore asks discovery from the said several defendants as to their title to said stock.

90 4. And this complainant further says that in the suit in equity brought by it and others in the Circuit Court of Kanawha County, West Virginia, against The American Planograph Company and others, referred to in complainant's said answer in this suit as well as in complainant's notice to the said National Savings and Trust Company, set out in an exhibit A of said answer,

it was impossible to obtain personal service on any of the defendants therein excepting the said American Planograph Company, and that the other defendants therein have kept out of the jurisdiction of said court, and have done so in most, if not all, cases, as this complainant is informed and believes, for the purpose of avoiding service of process on them requiring them to appear and answer in said suit; and, further, that no officer or director of said Planograph Company who is named as defendant in said suit has been present at any of the annual meetings of said company in West Virginia since the institution of said suit, though prior to that time one or more of the officers of said company always attended its annual meetings.

5. And complainant further alleges that said Planograph Company is the owner of a large number of valuable patents and applications for patents for inventions of the said Charles T. Moore, George R. Cornwall and others, and that in order to ascertain the present status of such patents in relation to said Planograph Company, this complainant has had the records of the United States Patent Office examined by a competent patent attorney, and has found up to this time, to wit, December 10, 1907, but comparatively few as-
91 signments of patents or applications for patents to said Planograph Company, and has failed to find any assignment of certain valuable patents or applications of patents for inventions of the said Moore and Cornwall that it believes and alleges belong to said company; and complainant further alleges on information and belief that the Board of Directors of the said Planograph Company, being practically controlled by the Cornwall-Moore interest, (having been elected by the very stock which this complainant claims properly belongs to it, and is subject to a trust, in its favor) has neglected and still neglects to insist on a proper assignment to said company of the inventions and patents that rightfully belong to it, but allows the same to remain in the names of the said inventors, Moore and Cornwall, thereby giving them an undue and unlawful advantage over said company, which advantage complainant alleges, on information and belief, they continually exercise to the great injury and detriment of said company and this complainant; and complainant says there is grave danger that under the present management the Planograph Company will lose its property in such inventions. And, in this connection, this complainant says that in the report of the Board of Directors of said Planograph Company, made to its stockholders, under date of April 23, 1906, at which time said Cornwall was a director, the following statement appears:

"A new perfecting press with one printing or form cylinder has also recently been completed and successfully tried out which, by the aid of the offset method, prints on simultaneously both sides of the paper at one revolution of the cylinder. Two other types of planographic pressure are in course of construction in our
92 drafting department and if we may judge by the interest shown in these presses, there will be a considerable market for them even before the composing machine is ready."

And complainant says that he has been unable to find any assignment to said Planograph Company of the patents, or applications for

patents for said presses; and that the said Cornwall since said report was made, has, on more than one occasion, as complainant is informed and believes, pretended that the inventions under which said presses were constructed belonged to him personally, and has threatened to form a new and rival company based on such inventions. And complainant alleges, on information and belief, that in this and many other cases the inventions, patents and applications for patents that rightfully belong to said Planograph Company have not been properly assigned to it. And complainant says that in this and in other ways those in control of the company have wasted and are wasting the company's assets, and have wilfully neglected to collect and reduce to possession the property of the company.

And further, that they have voted to themselves extravagant and illegal salaries wholly out of proportion to any service rendered by them; that an annual salary of six thousand dollars ($6,000) has been paid to the said Ernest M. Pease, and a salary of like amount to both George R. Cornwall and Charles T. Moore, while John D. Morgan, one of the directors of the company, is employed as a patent attorney at a salary of about thirty-five hundred dollars a year; and, as complainant is informed and believes, the salaries continue even when there is no money in the treasury to pay
93 them, and thus accumulate as a debt against the company.

And complainant alleges that, there is danger that the company will be embarrassed, or even sold out, for and *as* account of the debts to themselves and others which the present management has created; and complainant says that there is urgent need of a change of management, but that by means of the voting trust referred to in the bill and set out in one of the exhibits, attached thereto, and by aid of this very stock in controversy, the present directors and officers of the company are able to keep themselves in control; and this complainant insists, therefore that this stock which controls the company should not be permitted to go out of the jurisdiction of this court.

6. This complainant is willing that the National Savings and Trust Company, complainant in the original bill filed herein, may be permitted to resign and retire from the trust now incumbent upon it as is in the said bill stated, provided that some other person or corporation can be found to assume the said trust in the same condition in which the same now exists and without altering the existing status of the said stock to the prejudice of this complainant; but this complainant respectfully submits and insists that any such person or corporation, who may be, by the leave and authority of this court, substituted as such trustee, should be a responsible person or corporation and, preferably, a resident of this District, and that, in any case, such substituted trustee should be required, upon the assumption of the said trust and before the receipt by him or it of the
94 said stock, to enter an appearance in this cause and to be made a party defendant to this cross-bill, and that the said trustee should be, in respect of the custody, control and disposal of the said stock, subject to the direction of this Court, and that, in case any sale or sales of any portion of the said stock shall be authorized, the

proceeds of such sale or sales should be held by such trustee subject to the orders of this Court and to be distributed, applied, or otherwise disposed of in accordance with such orders.

The premises considered, the said complainant prays:

I. That the said persons and corporations hereinabove named as defendants be made parties defendant to this cross-bill, and that service of process upon them may be authorized to be effected by service thereof upon their respective solicitors of record in this cause.

II. That the said defendants be required to answer all the exigencies of this cross-bill but not under oath, the requirement of such oath being hereby expressly waived as to all of the said defendants.

III. That the American Planograph Company, defendant hereto, be required to discover and to state in detail to whom the several shares of the said stock hereinabove mentioned were originally issued, and the consideration paid therefor, and in whose names the said shares, severally, now stand upon the books of the said Company, and what intermediate transfers, if any, of such shares have been made and notified to the said Company, together with the
95 considerations for such transfers as the same appears upon the records of the said Company; and that each of the other defendants, excepting the National Savings and Trust Company, be required to discover and to state how many of the said shares he or she may claim to own, and whether he or she claims such shares in his or her own right, or in the right of another, or as trustee, or otherwise, and from whom, by what means, and upon what considerations he or she obtained the title or alleged title by which such shares are claimed by him or her.

IV. That an order may be at once passed herein declaring that the National Savings and Trust Company, defendant to this cross-bill, holds the stock herein mentioned subject to such order or orders as may hereafter, upon application of any of the parties to this cause, be made in reference to such stock; and declaring the said defendant to be a trustee of the said stock for the purposes of this cause; and providing further that, in the event that the said defendant shall be permitted to resign the said trust and to retire therefrom, any other person or corporation, who or which may be substituted for the said defendant as trustee to hold the said stock, shall be deemed to be in like manner a trustee of the said stock for the same purposes and shall hold the same in like manner; and that the said defendant and such other substituted trustee or trustees shall hold the said stock subject to the direction and order of this Court in respect of the custody, control, management and disposal of the said stock and of any proceeds which may be derived from the sale, exchange or other disposal of the said stock or any part
96 thereof.

V. That by the same order it may be provided that the said defendant, The National Savings and Trust Company, trustee as aforesaid, or any other person or corporation who or which may be, by the leave and authority of this Court, substituted therefor as such trustee, shall be authorized and directed to report to this Court any offer which may be made for the purpose of purchasing

the said stock or any part thereof, and any opportunity to sell the said stock or any part thereof which may be presented to such trustee and shall be deemed by him or it favorable and advantageous; and that either or any of the parties hereto shall have leave to apply to this Court for an order authorizing and directing the sale of the said stock or of some part thereof to be made upon such terms and at such prices as may be shown to be practicable and advantageous; and if upon such report or such application any such sale shall be authorized by the Court to be made and shall be made by the trustee for the time being of the said stock, the said trustee shall hold the proceeds of such sale subject to the further order of the Court in the premises and in like manner as the stock itself is declared to be held.

VI. That by the same order it may be further provided, concerning the resignation by the said defendant, the National Savings and Trust Company, of the trust now incumbent upon it in respect of the said stock, that the said defendant may have leave to resign the said trust and to retire therefrom, upon the nomination by it
97 to this Court of some other trust company, or other corporation as a substituted trustee, and upon a satisfactory showing to this Court that such corporation is solvent and able to respond to any party in interest to the amount of the value of the said stock, and that the corporation so nominated as such substituted trustee is willing to accept the trust of the said stock as a trustee of this Court, and subject to the order and direction of this Court, and to cause its appearance to be entered in this cause as a party thereto and to be made a defendant to this cross-bill in the place and stead of the said National Savings and Trust Company.

VII. That the said Charles T. Moore, Henry L. Bryan, and George R. Cornwall be jointly and severally charged as trustees for this Complainant for all money, stock and other things that they, or any of them, have wrongfully received for his or their gain or advantage, to the detriment of this Complainant by and through their said conspiracy to injure said Complainant, and be decreed to account therefor, and to pay over so much thereof as shall be adjudged to be the property of this Complainant, or property in which said Complainant has a beneficial interest.

VIII. That the said Charles T. Moore, Henry L. Bryan and George R. Cornwall be jointly and severally charged as trustees for this Complainant of all stock, money or other things they, or any of them, have wrongfully received for his or their gain or advantage, to the prejudice or injury of this Complainant, by and through the conspiracy and wrongful acts of the said Moore, Bryan and
98 Cornwall set forth in this cross-bill, and that they be ordered to account therefor and to pay over so much thereof as shall be adjudged on final hearing to be the property of this Complainant, or property in which it has a beneficial interest.

IX. That Richard C. Thompson and W. C. Mains be adjudged trustees for this Complainant of so much of the twenty-five thousand five hundred and forty-eight shares of Planograph stock, held by them as trustees, as shown in Exhibit B attached to bill in this suit, as shall be adjudged upon final hearing to be the property of this

Complainant or property in which it has a beneficial interest by reason of the said conspiracy of the said Moore, Bryan and Cornwall, or of other wrongful acts of the defendants herein, or any of them, and be directed to account therefor, and pay over so much thereof as shall be adjudged on final decree to be the property of this Complainant or property in which it has a beneficial interest, and also that each of the other defendants herein, excepting *bona fide* holders for value without notice, be likewise charged as trustee for this Complainant of so much of said stock wrongfully obtained by said Moore, Bryan or Cornwall, as aforesaid, as may have come into their possession or under their control, and be decreed to account therefor.

X. That the said Charles T. Moore, George R. Cornwall, Henry L. Bryan and Ernest M. Pease, be required to make discovery of all contracts, agreements or arrangements they, or any of them, may have entered into with any of the others, respecting the stock of said Planograph Company, or in any way relating to the
99 affairs of that Company, or his or their interest therein, and to produce in Court such of said contracts as may be in writing.

XI. And that Complainant may have such other and further relief as the nature of the case may require.

THE MOORE PRINTING TYPEWRITER COMPANY,
By RUSSELL W. MONTAGUE, *Its President.*

C. A. KEIGWIN,
GEO. P. MONTAGUE,
Solicitors for the Moore Printing, &c., Co.

DISTRICT OF COLUMBIA, *ss:*

I, Russell W. Montague, on oath say that I am the president of the Moore Printing Typewriter Company, the complainant in the foregoing cross-bill, and its agent for the purpose of verifying the same; that I have read the said cross-bill and know the contents thereof; that the allegations therein set forth as of my personal knowledge are true, and that those set forth upon information and belief I believe to be true.

RUSSELL W. MONTAGUE.

Subscribed and sworn to before me this 12th day of December, A. D., 1907.

[SEAL.] CHARLES LOWELL HOWARD,
Notary Public, D. C.

(Endorsed.)

Leave to file granted.

HARRY M. CLABAUGH,
Chief Justice.

Dec. 13", 1907.

8—1854A

100 *Decree.*

Filed December 13, 1907.

In the Supreme Court of the District of Columbia.

27204. In Equity.

THE NATIONAL SAVINGS & TRUST CO.
v.
THE MOORE PRINTING TYPEWRITER CO. ET AL.

This case came on to be heard at this term on the bill and answers and was argued by counsel for the respective parties in interest, and upon consideration thereof it is this 13th day of December, 1907, ordered, adjudged and decreed that the complainant The National Savings and Trust Company be and it is hereby authorized and directed to deliver to the New York Trust Company of the City and State of New York its successor in the trust referred to in the pleadings in this case all the certificates of stock in the American Planograph Company which it holds by virtue of the agreement of which Exhibit A to the bill of complaint in this case is a copy, and to make such endorsements upon such certificates as may be required to enable its said successor to take complete title to such certificates. And it is further ordered that upon compliance by said complainant with this order it shall be discharged from all liability to the defendants in this case and each of them in respect of such certificates and its action as trustee under said agreement:

101 Provided however that this decree and order shall be void if on or before the 23d day of December 1907, the defendants The Moore Printing Typewriter Company, Russell W. Montague and George P. Montague, or one or more of said last named defendants by way of a cross bill in this case or by original bill in this Court as they may be advised shall apply for and obtain a restraining order or injunction with undertaking and security as required by Equity Rule 42 of this Court, prohibiting such transfer of said certificates.

This decree is made upon the consent in open court of Counsel for the defendants other than the Moore Printing Typewriter Company, Russell W. Montague and George P. Montague that under such proposed cross bill service of subpœna to answer may be made as to them upon their solicitor of record in this case.

HARRY M. CLABAUGH,
Chief Justice.

From the foregoing decree, the defendants Russell W. Montague, George P. Montague & the Moore Printing Typewriter Company, in open court, pray an appeal to the Court of Appeals of the District of Columbia, and the same is allowed them, and the amount of the appeal bond for costs is fixed at $100.

HARRY M. CLABAUGH,
Chief Justice.

102 *Memorandum.*

December 27, 1907.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed December 16, 1907.

In the Supreme Court of the District of Columbia, the 16 Day of December, 1907.

Equity. No. 27204.

NATIONAL SAVINGS & TRUST COMPANY
vs.
THE MOORE PRINTING TYPEWRITER CO. ET AL.

The Clerk of said Court will please prepare a transcript of the record in the above cause, to consist of the
Original Bill,
Answers of all defendants, with exhibits,
Order for calendaring,
Motion for leave to file cross-bill,
The cross-bill,
The Decree,
Memorandum of Bond.

C. A. KEIGWIN,
Solicitor for Moore, &c., Co. et al., Appellants.

103 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 102, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27204 in equity, wherein National Savings and Trust Company, a body corporate, is Complainant, and The Moore Printing Typewriter Company, a body corporate, *et als.*, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 20th day of January, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Cl'k.*

Endorsed on cover: District of Columbia supreme court. No. 1854. The Moore Printing Typewriter Co. *et al.*, appellants, *vs.* National Savings and Trust Co. *et al.* Court of Appeals, District of Columbia. Filed Jan. 20, 1908. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia, April Term, 1908.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY et al., Appellants,
vs.
NATIONAL SAVINGS AND TRUST COMPANY et al., Appellees.

Now come the appellees, except the National Safe Dep. & Trust Co. by A. S. Worthington their attorney, and suggest to the Court the death of the appellee, John H. White.

A. S. WORTHINGTON.

(Endorsed:) No. 1854. April Term 1908. Moore Printing Typewriter Co. et al. vs. National Savings & Trust Co. et al. Suggestion of death of the appellee John H. White. Court of Appeals, District of Columbia. Filed Apr. 7, 1908. Henry W. Hodges, Clerk.

TUESDAY, *April 7th, A. D.* 1908.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate; RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS AND TRUST COMPANY and AMERICAN PLANOgraph Company, Bodies Corporate; Ernest M. Pease, Henry J. Gensler, et al.

The death of John H. White, one of the appellees herein, was suggested to the consideration of the Court by Mr. A. S. Worthington, attorney for the appellees, which was not denied.

In the Court of Appeals, District of Columbia.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY et al., Appellants,
vs.
THE NATIONAL SAVINGS AND TRUST COMPANY et al.

Supplemental Suggestion of Death.

Now come the appellants in the above entitled cause and give the Court to understand and be informed that John H. White, one of the appellees, whose death has been heretofore herein suggested by the appellees, departed this life on the twelfth day of December in the year 1907, before the entry of the decree herein appealed from and before the taking of the appeal in this cause.

And the said appellants consent that their appeal shall be dismissed as to the said John H. White and as to his heirs and personal representatives and transferees and as to all of the eleven hundred and fifty-eight shares of the stock mentioned in the complainant's bill, which then stood or now stands in the name of the said John H. White, or of his heirs or representatives, or in the name of any grantee, vendee, appointee or other person holding, or claiming to hold title to any part or to all of the said eleven hundred and fifty-eight shares of stock originally conveyed to the National Savings and Trust Company, appellee, by the said John H. White.

C. A. KEIGWIN,
G. P. MONTAGUE,
Solicitors for Appellants.

(Endorsed:) No. 1854. In the Court of Appeals, District of Columbia. The Moore Printing Typewriter Company, et al., Appellants, vs. The National Savings and Trust Company, et al. Supplemental suggestion of the death of John H. White. Court of Appeals, District of Columbia. Filed Apr. 14, 1908. Henry W. Hodges, Clerk.

In the Court of Appeals, District of Columbia.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY et al., Appellants,
vs.
THE NATIONAL SAVINGS AND TRUST COMPANY et al.

Disclaimer.

Referring to the eleven hundred and fifty-eight (1158) shares of Planograph stock mentioned in the complainant's, the National Savings and Trust Company's bill as having been transferred to it by John H. White (Record p. 9), the appellants say that they do not claim that any part of said eleven hundred and fifty-eight shares was, in the hands of the said John H. White, or was or is, in the hands of his assignees or legal representatives, in any way tainted with fraud, or subject to any trust, lien or claim in their, the said appellants', favor.

CHAS. A. KEIGWIN,
GEORGE P. MONTAGUE,
Solicitors for Appellants.

(Endorsed:) No. 1854. In the Court of Appeals, District of Columbia. The Moore Printing Typewriter Company, et al. Appellants, vs. The National Savings and Trust Company, et al. Disclaimer. Court of Appeals, District of Columbia. Filed Apr. 15, 1908. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia.

Filed Apr. 20, 1908. Henry W. Hodges, Clerk.

In the Court of Appeals, District of Columbia, January Term, 1908.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY et al.
vs.
NATIONAL SAVINGS AND TRUST COMPANY et al.

The appellees in this case, The American Planograph Company, Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D. C. McEwen, Frederick J. Warburton, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains, and J. Keith M. Norton, move the court to dismiss the appeal in this case:

1st. Because the appeal is taken by only three of the defendants in the original bill, without any summons and severance as to the others or any of them.

2d. Because the decree appealed from is not a final decree.

3d. Because the operation of the decree appealed from by its terms was suspended to the 23d day of December, 1907, whereas the appeal was taken on the 13th day of December, 1907, before said decree had any effect.

A. S. WORTHINGTON,
Solicitor for The American Planograph Company and the Other Appellees Named in the Body of the Above Motion.

To Charles A. Keigwin and George P. Montague, Solicitors for the Moore Printing Typewriter Company, Russell W. Montague, and George P. Montague:

Take notice that the foregoing motion will be presented to the court on Monday, April 20, 1908, at the opening of the court, or as soon thereafter as counsel can be heard.

A. S. WORTHINGTON,
Solicitor for Above-named Appellees.

Service of copy of foregoing notice acknowledged this 17th day of April, 1908.

C. A. KEIGWIN,
For Appellants.

MONDAY, *April 20th, A. D.* 1908.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate; RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS AND TRUST COMPANY and AMERICAN PLANOgraph Company, Bodies Corporate; Ernest M. Pease, Henry J. Gensler, et al.

The motion to dismiss in the above entitled cause was submitted to the consideration of the Court by Mr. A. S. Worthington, of counsel for the appellees, in support of motion, and by Mr. C. A. Keigwin, in opposition thereto.

The argument in the above entitled cause was commenced by Mr. C. A. Keigwin, attorney for the appellants, and was continued by Messrs. A. S. Worthington, J. J. Darlington and John J. Crawford, attorneys for the appellees, and was concluded by Mr. C. A. Keigwin, attorney for the appellants.

On motion the appellees are allowed to file reply brief herein, if so advised.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate; RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS AND TRUST COMPANY and AMERICAN PLANOgraph Company, Bodies Corporate; Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D. C. McEwen, Frederick J. Warburton, John H. White, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains, and J. Keith M. Norton.

Opinion.

(Mr. Justice Van Orsdel delivered the opinion of the Court:)

This is an appeal from a decree entered in the Supreme Court of the District of Columbia in an action brought by appellee, plaintiff below, to be relieved from a certain trust agreement, and to be permitted to surrender stock held by it in trust to a new trustee. For convenience, the parties will be referred to as plaintiff and defendants in the same relation they sustained in the court below.

On April 26, 1906, an agreement was made by Bessie P. Cornwall and others, as parties of the first part, with the plaintiff, as the party of the second part. The agreement, among other things, stipulated

that its object was to hold together in trust a majority of the corporate stock of the American Planograph Company in order to secure a safe and prudent management of the affairs of the company. The parties of the first part were to transfer to the plaintiff thirty-five thousand and five shares of the capital stock of said company for the purposes set forth in the agreement. Plaintiff issued to each person transferring stock to it, a trustee's certificate, which recited the number of shares deposited by him, and that the holder of such certificate was entitled to an equitable interest in the thirty-five thousand and five shares, equivalent to the number of shares deposited by him, and that on or after March 31, 1911, the holders of such certificates should be entitled to a certificate for an equal number of shares of the stock of said company. It was also provided that on March 31, 1911, the plaintiff should transfer on the books of the American Planograph Company the stock so held in trust, and deliver certificates thereof to each holder of the trust certificates. The agreement contained the usual conditions in such contracts to the effect that the stock should be transferred on the books of the company to plaintiff, and that plaintiff should vote the stock in the manner directed by the owners of a majority of the amount of the trustee's certificates; that a record should be kept of the shares deposited and the holders of certificates; that plaintiff should collect dividends and pay the same to the holders of the trustee's certificates, and that plaintiff should be compensated for its services in an amount stipulated in the agreement. The agreement also provided that upon the resignation of plaintiff as trustee, the holders of a majority, in amount, of the trust certificates should elect a trustee to fill the vacancy. The plaintiff assumed the trust, under said agreement, and the stock to the full amount was turned over to it by the parties of the first part.

In addition to the above facts, the plaintiff in its bill alleged the performance of the agreement, the transfer to it of the thirty-five thousand and five shares of stock, and the issue of the trustee's certificates therefor. It further alleged that it had notified the parties in interest, through whom it derived its position of trustee, of its desire to resign such position, and that, pursuant to its notice, the holders of a majority in amount of the trust certificates had appointed the New York Trust Company, of the City of New York, to be trustee under the agreement, in the place and stead of the plaintiff.

The plaintiff further alleged that, in suits brought by Cecil H. Moore and Julia B. Moore, respectively, injunctions had been granted restraining the plaintiff from removing the stock from the District of Columbia, and also that plaintiff had been served with notice by the Moore Printing Typewriter Company, Russell W. Montague, and George P. Montague to the effect that they claimed that a large part of the thirty-five thousand and five shares of American Planograph Company's stock, held in trust by the plaintiff, was subject to a trust in their favor. The defendants named in the bill included the holders of the trustee's certificates issued by plaintiff and also Cecil H. Moore, Julia B. Moore, the

American Planograph Company, the Moore Printing Typewriter Company, Russell W. Montague, and George P. Montague. The relief demanded in the bill was, "that the complainant may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee; and that the complainant may be instructed by the court as to the manner and form of transfer by it to its successor in said trust."

All the defendants, except the appellants, the Moore Printing Typewriter Company and Russell W. and George P. Montague, filed a joint answer, in which they admitted substantially all the facts alleged in the bill, and consented that a decree might be entered relieving the plaintiff of the trust, and authorizing it to surrender the stock to the New York Trust Company; but denied the allegations in the bill that the plaintiff could not so transfer the stock without risk or liability of loss.

The Moore Printing Typewriter Company and Russell W. and George P. Montague filed answers in which they alleged, in substance, that, in January, 1900, and prior and subsequent thereto, the Moore Printing Typewriter Company, a corporation, either by itself, or through the agency of another corporation, the Linomatrix Company, (nine-tenths of the stock of which belonged to the Moore Printing Typewriter Company and its stockholders,) owned all the inventions and patents for the United States of the defendant Charles T. Moore, together with all his future improvements thereon; that, thereafter, Moore entered into a conspiracy with the defendants Henry L. Bryan and George R. Cornwall for the purpose of acquiring for an inadequate sum the assets of the Moore Printing Typewriter Company and the Linomatrix Company, and to that end entered into a contract with Cornwall by which Moore engaged his services to Cornwall for the purpose of perfecting inventions relating to printing, and taking out the patents therefor, which inventions are alleged to be of the same character as those which Moore had already assigned to the Moore Printing Typewriter Company. It was further alleged in the answer that the American Planograph Company was formed for the purpose of carrying out this alleged fraudulent scheme, and that twenty-six thousand, *either* hundred and thirty-one shares of the stock of that company were issued to Moore, Cornwall, and Bryan, or their appointees, and that the stock so issued, or other stock issued in lieu of it, constituted the greater part of the thirty-five thousand and five shares held in trust by the plaintiff.

Plaintiff set the cause down for trial on bill and answer. On hearing, and before judgment, defendants, by leave of court, filed a cross bill. It was attempted, by means of this bill, to, in effect, restrain any performance of the trust, under the agreement, either by the plaintiff or its successors in trust; and to prevent any sale of the stock, except upon condition that the proceeds should be held subject to the order of the court. We cannot escape the conclusion that this was an attempt on the part of defendants to reap the benefits of an injunction without giving bond. The court, recognizing its inability to grant the prayer under the rules govern-

ing equity practice in that court, but apparently anxious to protect the rights of defendants, entered a conditional decree authorizing and directing the plaintiff to deliver to the New York Trust Company, as its successor in trust, all the certificates of stock in the American Planograph Company which it held by virtue of the agreement made between the holders of said stock and plaintiff as trustee, and to make such endorsement upon the certificates of stock held by it as may be required to enable its successor to take complete title to such certificates. It was further decreed that, upon compliance by the plaintiff with the decree of the court, it should be discharged from all liability to the defendants in respect to such certificates and this action, as trustee, under said agreement. This decree, however, was entered with a proviso to the effect that "this decree and order shall be void if on or beefore the 23rd day of December, 1907, (ten days from the date of the decree,) the defendants, The Moore Printing Typewriter Company, Russell W. Montague, and George P. Montague, or one or more of said last named defendants, by way of cross bill in this case or by original bill in this court as they may be advised shall apply for and obtain a restraining order or injunction with undertaking and security as required by Equity Rule 42 of this court, prohibiting such transfer of said certificates." The case is here on appeal from this judgment.

A motion was filed by plaintiff to dismiss this appeal for the reason that the judgment appealed from had not become final at the date the appeal was taken. The defendants took the present appeal on the same day that the order was entered, without waiting for the expiration of the ten days within which they were permitted to apply for a restraining order under the terms of the decree. It is insisted by counsel for plaintiff that this court is without jurisdiction to consider this appeal for the reason that the decree of the court below, by its terms, did not become final until the 23rd day of December, 1907, ten days after the appeal was taken. It is urged that, on the date the appeal was taken, the purpose of the decree was subject to be defeated by the action of the defendants, and that the decree was of no effect whatever until the expiration of the ten days, when it would, by its terms, become absolute. It is well settled that an appeal will not lie from an interlocutory order, but we do not regard the decree before us as such an order. Here, the condition was one which was available only to the defendants, and, we think, it was within their power to either accept the condition which would have involved further proceedings in the trial court, or prosecute their appeal. Having adopted the latter course, it was equivalent to a waiver of any further right to avail themselves of the condition contained in the decree, and had the effect of making the decree at once final and absolute.

It is urged by counsel for defendants that the bill filed by plaintiff in this cause is in effect a bill of interpleader. With this contention, we cannot agree. In accordance with the privilege reserved to plaintiff in the trust agreement, plaintiff gave notice of its desire to retire from the trusteeship, and requested the depositors to select its successor. The depositors selected the New York Trust Com-

pany. Plaintiff was confronted with defendants' notice to the effect that they had a claim against the stock held by it. This proceeding was brought by the plaintiff, with notice of the conflicting claims, to be relieved of the trust, and instructed as to the manner in which it should turn over the stock to its successor, the New York Trust Company. No attempt was made by defendants to compel a distribution of the stock. They presented no objection to the transfer of the stock to the New York Trust Company, except to insist, in their cross bill, that plaintiff should not be relieved of any liability imposed upon it by virtue of said notice.

Plaintiff was not in a position to interplead. It was under a contract with the depositors of the stock, and it could not interplead them and defendants, who claimed under an antagonistic and alleged paramount title. Pomeroy's Eq. Jr., 3rd ed., sec. 1326 and 1327. The rule applicable to this case, touching the question of interpleader, was announced by this court in Richardson vs. Belt, 13 App. D. C., 200, "An essential foundation of the equity of interpleader is, that the party seeking the relief must not be under an independent or special liability to one of the claimants (Adams Eq., 204; 3 Pom. Eq., sec. 1327). Where there is an independent liability of the party seeking the relief to one of the several defendants, arising out of the relations subsisting between them or upon a special contract creating, for example, the relation of bailor and bailee, landlord and tenant, or creditor and debtor, there can be no interpleader, unless it be made to appear that others have acquired a claim of title or interest under the said liability." The claim here asserted was not derived from the contractual relation existing between plaintiff and the depositors of the stock. The claim affected the title to the stock, for the return of which plaintiff was bound by its contract to one of the parties.

It is clear that defendants' claim affected vitally the depositors of the stock, who held plaintiff's certificates therefor. They could not be forced to try title upon the mere answer of defendants. If defendants were anxious to try title, which seems doubtful, they should have proceeded in a proper manner to have brought the holders of the trustee's certificates before the court. Having failed in this, if they were in danger of being damaged by the removal of the stock to New York, which is not clearly apparent to us, they could have accepted the invitation of the court, and asked for a restraining order to prevent the removal of the stock from the jurisdiction of the court. This they refused to do.

We fail to discover wherein the rights of defendants have been prejudiced by the action of the court below. There was no error. The judgment is affirmed with costs, and it is so ordered.

Affirmed.

TUESDAY, *June 2nd, A. D.* 1908.

April Term, 1908.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate; RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS AND TRUST COMPANY and AMERICAN PLANOGRAPH Company, Bodies Corporate; Ernest M. Pease, Henry J. Gensler, et al.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL.
June 2, 1908.

TUESDAY, *June 9th, A. D.* 1908.

No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate; RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS AND TRUST COMPANY and AMERICAN PLANOGRAPH Company, Bodies Corporate; Ernest M. Pease, Henry J. Gensler, et al.

On motion of Mr. C. A. Keigwin of counsel for the appellants in the above entitled cause, It is ordered by the Court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

Court of Appeals of the District of Columbia, April Term, 1908.

In Equity. No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS & TRUST COMPANY, AMERICAN PLANOGRAPH COMPANY, ERNEST M. PEASE, and Others.

Russell W. Montague and George P. Montague, two of the Appellants in the above-entitled cause, being duly sworn, say that they

are respectively the President and Vice President of The Moore Printing Typewriter Company, the other Appellant, and that ever since the consolidation of that Company with the American Planograph Company, as set forth in said Moore Typewriter Company's answer in this suit, viz: in June, 1901, they have been stockholders of, and largely interested in, said Planograph Company; that they have known of many sales of the stock of said last named Company at prices ranging from ten to fifty dollars a share; that they have known of no sales of said stock below eight dollars a share; and they say that the value of the stock in controversy, exceeding, as it does, twenty thousand shares of said Planograph stock, is very greatly in excess of five thousand dollars; that they believe it is worth more than one hundred thousand dollars; and they further say that it was stated in open court by one of the appellees in this suit to be worth several hundred thousand dollars at least.

RUSSELL W. MONTAGUE.
GEORGE P. MONTAGUE.

Subscribed and sworn to before me this 18th day of June, 1908.
[NOTARIAL SEAL.] CHARLES LOWELL HOWARD,
Notary Public.

(Endorsed:) No. 1854. Court of Appeals of the District of Columbia. The Moore Printing Typewriter Co. and others, Appellants, vs. National Savings & Trust Company and others. Affidavit as to Value. Court of Appeals, District of Columbia. Filed Jun 18, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia, April Term, 1908.

In Equity. No. 1854.

THE MOORE PRINTING TYPEWRITER COMPANY, RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,
vs.
NATIONAL SAVINGS & TRUST COMPANY, AMERICAN PLANOGRAPH COMPANY, ERNEST M. PEASE, and Others.

Assignment of Errors.

It is respectfully submitted that the Court of Appeals of the District of Columbia erred in the following respects:

1. In affirming the decree of the Supreme Court of the District of Columbia that the National Savings & Trust Company, the complainant, should transfer the stock in controversy to the New York Trust Company.

2. In affirming the decree of said lower Court that the Moore Printing Typewriter Company, Russell W. Montague and George P. Montague should be permitted to assert their rights against the

said stock only upon condition of obtaining an injunction and giving a bond.

3. In affirming the decree of said lower Court that the said complainant Trust Company should be discharged of its liability to the appellants without making it a condition precedent to such discharge that the stock in controversy should be brought into Court, or placed subject to the order of the Court.

4. In not decreeing that the said complainant Trust Company held the stock in controversy as a constructive trustee for the appellants.

5. In not decreeing that such of the other appellees, into whose hands or subject to whose control, legal or equitable, any of the stock tainted with fraud, or the proceeds thereof, had come were constructive trustees thereof for said appellants.

6. In not rendering a final decree adjudging the title to the stock in controversy to be in the Moore Printing Typewriter Company.

(The foregoing being the errors specifically assigned to the decree of the Supreme Court of the District of Columbia.)

7. In decreeing that the title to the property in controversy could not be tried upon bill and answers.

8. In not decreeing that the complainant's bill was a bill of interpleader, or a bill in the nature of a bill of interpleader, or one that, under the pleadings in the case, should be treated as such.

9. In not decreeing that the lower court should retain jurisdiction of the cause and do complete justice between the parties on the ground of fraud, and in order to avoid a multiplicity of suits.

CHARLES A. KEIGWIN,
GEORGE P. MONTAGUE,
Solicitors for Appellants and of Counsel.

(Endorsed:) No. 1854. Court of Appeals of the District of Columbia. The Moore Printing Typewriter Company and others, Appellants, vs. National Savings and Trust Company and others. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jun- 18, 1908. Henry W. Hodges, Clerk.

Bond on Appeal.

Know all men by these presents:

That we, The Moore Printing Typewriter Company, a body corporate under the laws of the State of West Virginia, and Russell W. Montague, of White Sulphur Springs, West Virginia, and George P. Montague, of the District of Columbia, as principals; and The Title Guaranty and Surety Company, a body corporate under the laws of the State of Pennsylvania, as surety, are held and firmly bound unto the National Savings and Trust Company and American Planograph

Company, bodies corporate, Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Device, D. C. McEwen, Frederick J. Warburton, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains and J. Keith M. Norton, appellees in the suit hereinafter mentioned, in the full sum of Three Hundred ($300) Dollars to be paid to the said National Savings and Trust Company and American Planograph Company, bodies corporate, Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D. C. McEwen, Frederick J. Warburton, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, Cecil H. Moore, Henry L. Bryan, Richard C. Thompson, William C. Mains and J. Keith M. Norton, their certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents. Sealed with our seals and dated this 17th day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, to wit, on the Second day of June, 1908, in a suit depending in said Court between the said The Moore Printing Typewriter Company, a body corporate; Russell W. Montague, and George P. Montague Appellants, and National Savings and Trust Company and American Planograph Company, bodies corporate; Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Device, D. C. McEwen, Frederick J. Warburton, John H. White, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains, and J. Keith M. Norton, Appellees, being Equity Suit No. 1854 in said Court, a decree was rendered against the said Appellants, and the said Appellants having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said persons designated as appellees citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said The Moore Printing Typewriter Company, Russell W. Montague, and George P. Montague, Appellants as aforesaid shall prosecute said appeal to effect, and answer all costs if they fail to make

their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Seal of Moore Printing Typewriter Company.)

THE MOORE PRINTING TYPEWRITER COMPANY.
RUSSELL W. MONTAGUE, *Its President.*
RUSSELL W. MONTAGUE. [SEAL.]
GEORGE P. MONTAGUE. [SEAL.]

(Seal of Title Guaranty and Surety Company.)

THE TITLE GUARANTY AND SURETY CO.,
By WILLIS W. PARKER,
Attorney in Fact.

Sealed and delivered in presence of:

F. L. PERRY.
F. J. MOSES.

Approved this twentieth day of June, 1908, by
CHAS. H. ROBB,
Associate Justice, Court of Appeals of the District of Columbia.

[Endorsed:] In Equity No. 1854. Court of Appeals of the District of Columbia. The Moore Printing Typewriter Company and others, Appellants, vs. National Savings & Trust Company, and others. Bond on appeal. Court of Appeals, District of Columbia. Filed Jun- 22, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To National Savings and Trust Company and American Planograph Company, bodies corporate; Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D. C. McEwen, Frederick J. Warburton, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains, and J. Keith M. Norton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The Moore Printing Typewriter Company, a body corporate; Russell W. Montague, and George P. Montague are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this twentieth day of June, in the year of our Lord one thousand nine hundred and eight.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 22d day of June, A. D. 1908.

A. S. WORTHINGTON,
(*For the Parties Whom I Represent on the Record.*)
J. J. DARLINGTON,
For Nat'l Savings & Trust Co.
S.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 22, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 81, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Moore Printing Typewriter Company, a Body Corporate; Russell W. Montague, and George P. Montague, Appellants, vs. National Savings and Trust Company and American Planograph Company, bodies corporate; Ernest M. Pease, Henry J. Gensler, et al. No. 1854, April Term, 1908, as the same remain- upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of June, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,248. District of Columbia Court of Appeals. Term No. 192. The Moore Printing Typewriter Company, a body corporate; Russell W. Montague, and George P. Montague, appellants, vs. National Savings and Trust Company and American Planograph Company, bodies corporate; Ernest M. Pease, Henry J. Gensler, William C. Mains, John D. Morgan, Winthrop Pond, Henry L. Bryan, Marion Bryan, William M. Kerr, Andrew Devine, D. C. McEwen, Frederick J. Warburton, Alice J. White, Emily J. White, George Otis Smith, Henry C. Cornwall, George R. Cornwall, Bessie P. Cornwall, James O. Clephane, John T. Granger, Rudolph Kauffman, Charles T. Moore, Julia B. Moore, and Cecil H. Moore, and Henry L. Bryan, Richard C. Thompson, William C. Mains, and J. Keith M. Norton. Filed July 2d, 1908. File No. 21,248.

(21248)

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 192.

THE MOORE PRINTING TYPEWRITER COMPANY, A BODY CORPORATE, RUSSELL W. MONTAGUE AND GEORGE P. MONTAGUE, *Appellants.*

v.

NATIONAL SAVINGS AND TRUST COMPANY AND THE AMERICAN PLANOGRAPH COMPANY, BODIES CORPORATE, ERNEST M. PEASE, HENRY J. GENSLER, *et al.*

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The decree appealed from having been made upon bill and answers, the facts are undisputed and may be stated as they appear in the pleadings.

The appellant, the Moore Printing Typewriter Company, was in 1900 and theretofore a corporation owning a number of valuable patents covering improvements

in the art of printing invented by Charles T. Moore, one of the appellees, and was entitled, in virtue of a convenant with the said Moore, to the assignment of any future patents to be obtained by him.

In January, 1900, the said Moore, being then a director in the Moore Company, and the appellee, Henry L. Bryan, also a director in the same company, entered into a conspiracy with George R. Cornwall, another of the appellees, for the purpose of wrecking the Moore Company and acquiring for themselves and for their own benefit the assets of that company, including the past and future inventions of Moore. To this end, and to enable Moore to evade his obligations to the Moore Company, the three appellees named, procured the incorporation and organization of a new company, called the American Planograph Company, the pretended purposes of which were of the same general character with those of the Moore Company.

Afterwards, by the use of this new incorporation, and by a course of fraudulent representations and of fraudulent conduct, which included the piracy of the most valuable machine of the Moore Company, the officers of the latter company were induced to believe that the Planograph Company possessed some inventions of great present and future value, and that the Moore Company would be benefited by a consolidation of the two corporations. (In this connection the "Moore Company" is intended to include the subcompany referred to in appellants' answers as the Linomatrix Company.) Accordingly, such a consolidation was effected in 1901, upon terms and in a manner which gave the complete control of the consolidated concern to Moore, Bryan and Cornwall and their confederates. These persons, in pursuance of their original

purposes as above stated, have used their control of the Planograph Company for their own profit, and have, by divers fraudulent and otherwise improper means, possessed themselves of a very large part of the 35,005 shares of that company's stock, deposited with the complainant as hereinbelow stated, to which they have no right in law or in morals. It seems unnecessary here to recite in detail the various and somewhat complicated transactions by which this result was effected, and which are set out in the answer of the appellant company (p. 15).

It is sufficient to say that the averments of this answer, being taken for true as they must be taken in this proceeding, fully establish the charge of gross fraud and corruption in the methods by which this stock was acquired by the conspirators and fully warrant the conclusion that the stock thus acquired is subject to a trust in favor of the Moore Company (p. 22).

Of the shares of Planograph stock thus fraudulently obtained, some are still held by the three appellees originally concerned in the transactions just recited, and the residue stand in the names of divers other persons who are in close personal and business relations with Moore, Bryan and Cornwall, and who are also among the appellees in this cause.

In April, 1906, the appellees already mentioned deposited with the remaining appellee, the National Savings and Trust Company, 35,005 shares of the stock of the Planograph Company, under an agreement by which the Trust Company was made a trustee to hold the said shares for the purpose of voting the same in the meetings of the Planograph Company (pp. 3, 7), and the stock was held by the Trust Company in accordance with this arrangement until the institution of the

present suit. In this deposit were included the shares which had been obtained by the fraud hereinbefore mentioned as practised upon the Moore Company and its stockholders, and which are subject to a trust in their favor (p. 22).

On May 22, 1906, the appellants, Russell W. Montague and George P. Montague, both of whom are stockholders in the Moore Company, and the former of whom is the president of that company, in their own names and in the name of the Moore Company, and for themselves and other stockholders and creditors of that company, addressed to the National Savings and Trust Company a letter which is the cause of this suit (p. 12).

By this letter the Trust Company was advised, in particular, that a block of about 27,000 shares of the stock deposited with it was claimed by the signers of the letter as subject to a trust in their favor, and that the title thus asserted was the subject of suit previously instituted in one of the courts of West Virginia and then pending; and that the Trust Company was warned against transferring this stock or parting with the possession of it under penalty of liability to the rightful owners thereof.

On July 2, 1907, the present suit was instituted by a bill in equity brought by the National Savings and Trust Company, to which the appellants and the depositors of the stock were made defendants (p. 2). The bill, besides some averments of no present materiality, states the deposit of the stock by some of the defendants, and the notice of May 22, 1906, given to the complainant company by the other defendants. It is thereupon stated that the complainant desires to resign its trusteeship, and that the depositors of the stock have consented to such resignation and have

directed the company to transfer the stock to the New York Trust Company, of New York City. The 9th paragraph of the bill, omitting an immaterial reference, is this:

> "By reason of * * * the said written notice Exhibit D, the complainant is advised that it may not transfer the said shares of stock in its possession to the said New York Trust Company as its successor in the said trust without the risk of liability and loss, except through the aid of this court, and that it is entitled in its said capacity as trustee to apply to this court for its instructions and its protection in the premises."

Exhibit D, referred to, is the notice given by the appellants on May 22, 1906.

The prayer was:

> "That the complainant may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee; and that the complainant may be instructed by the court as to the manner and form of transfer by it to its successor in the said trust."

The defendants, the Moore Company, Russell W. Montague and George P. Montague, who are now appellants, entered appearances to this bill on the first rule day after service of process, and on the next succeeding rule day, September 3, 1907, filed answers. The answer of the Moore Company, which was adopted by the individual appellants, states the facts hereinbefore recited relative to the fraud by which the title to the stock in question had been acquired by the present holders thereof; it admits that the complainant Trust Company is entitled to resign its trust of that stock;

but it submits that such relief can be granted the complainant and the rights of all parties protected only by the appointment of a receiver to hold the stock pending adjudication of the title thereto.

For more than two months no further steps were taken in the action. On November 26, 1907, the remaining defendants, being the depositors of the stock, filed a joint answer, in which they admitted, with a slight qualification, all the averments of the bill and consented to the transfer of the stock to the New York Trust Company (p. 48).

This answer wholly ignores the charges of fraud made against the respondents in the answers of their co-defendants.

On the same day, November 26, the solicitor for the complainant set the cause for hearing upon the bill and the answers (p. 50).

Thereupon, on December 13, the Moore Company offered a cross-bill, adopting the averments of its answers, supplementing them by additional charges of fraud and misconduct against the officers of the Planograph Company, and praying for appropriate relief. The bill further prays that the National Savings and Trust Company, the complainant in the cause and one of the defendants to the cross-bill, may be declared a trustee of the court and for the purposes of this cause, and that any other person or corporation substitued for the present trustee, shall hold the stock subject to the direction of the court (p. 51).

On the same day, December 13, the court gave leave to file this cross-bill (p. 57).

Again on the same day, the court entered a final decree in the cause (p. 58).

By this decree relief was granted in exact accordance

with the purpose of the bill, and the assent of the answer filed by the depositors of the stock, subject only to the condition that the Moore Company and the Messrs. Montague might avoid the decree by filing a bond and obtaining a restraining order or injunction against the removal of the stock from the jurisdiction.

This decree was affirmed on appeal by the Court of Appeals of the District of Columbia, June 2, 1908.

From the decree, as affirmed, the present appeal is prosecuted.

Assignment of Errors.

It is respectfully submitted that the Court of Appeals of the District of Columbia erred in the following respects:

1. In affirming the decree of the Supreme Court of the District of Columbia that the National Savings & Trust Company, the complainant, should transfer the stock in controversy to the New York Trust Company.

2. In affirming the decree of said lower Court that the Moore Printing Typewriter Company, Russell W. Montague and George P. Montague, should be permitted to assert their rights against the said stock only upon condition of obtaining an injunction and giving a bond.

3. In affirming the decree of said lower Court that the said complainant Trust Company should be discharged of its liability to the appellants without making it a condition precedent to such discharge that the stock in controversy should be brought into Court, or placed subject to the order of the Court.

4. In not decreeing that the said complainant Trust Company held the stock in controversy as a constructive trustee for the appellants.

5. In not decreeing that such of the other appellees, into whose hands or subject to whose control, legal or equitable, any of the stock tainted with fraud, or the

proceeds thereof, had come, were constructive trustees thereof for said appellants.

6. In not rendering a final decree adjudging the title to the stock in controversy to be in the Moore Printing Typewriter Company.

(The foregoing being the errors specifically assigned to the decree of the Supreme Court of the District of Columbia.)

7. In decreeing that the title to the property in controversy could not be tried upon bill and answers.

8. In not decreeing that the complainant's bill was a bill of interpleader, or a bill in the nature of a bill of interpleader, or one that, under the pleadings in the case, should be treated as such.

9. In not decreeing that the lower Court should retain jurisdiction of the cause and do complete justice between the parties on the ground of fraud, and in order to avoid a multiplicity of suits.

ARGUMENT.

Points and Authorities.

This suit is brought by a trustee, a corporation, for the purpose of resigning its trust and for relief against two adverse claims, having their origin the one in an express trust, and the other in a constructive trust, and both of these trusts are set out in complainant's bill.

The claimants under the express trust are the depositors of the stock with the complainant Trust Company, while the appellants who claim that the stock so deposited was and is subject to a constructive trust in their favor, are the claimants under the constructive trust.

The express trust, by its terms, provided a way by which the trustee could resign and be relieved of all

liability so far as the parties to the deed of trust were concerned, and those terms have been exactly complied with. Moreover, none of the claimants interposed any objection to the complainant, the trustee, resigning except in so far as their adverse claims to the trust stock might be prejudiced thereby; nor is there any controversy whatever between the parties except that growing out of the adverse claims; and it is for relief and protection against those claims, and for that purpose only, that the complainant asked, or was entitled to ask, the intervention and aid of a Court of Equity.

All the parties have submitted to the jurisdiction of the Court without objection or protest, and indeed, from the nature of the suit, there can be no question that it is one of equitable cognizance. The principle involved is

> "the well settled principle of equity that any trustee placed in circumstances in which he may have reasonable doubt as to the disposition of funds in his hands has a right, for his own safety, to apply to a Court of Equity for directions making the persons interested parties to the proceedings."
>
> Goodhue *v.* Clark, 37 N. H. 525; and authorities cited *infra.*

The stock in controversy in this case is according to the admitted averments of the record, the property of the appellants.

As against the complainant Trust Company, the fact that the depositors of the stock acquired their possession dishonestly and in fraud of the Moore Company is established by the complainant's setting down the cause for hearing upon bill and answers. As against the depositors, the same fact is established, at least for the purposes of present argument, by their failure to deny the charges of fraud made against them in the answers of the now appellants.

I. On First and Second Assignments of Error.

The object of a suit by a trustee for the direction of the Court on adverse claims is to bring the parties before the Court so that the claims can be litigated and the trustee know to which of the claimants he owes a debt or duty. A trustee has a right to bring the adverse claimants before the Court and require them to state their claims (Lewin on Trusts, 11th Ed. Chap. XIV, Sec. VI, pp. 396, 397); **but when he has done so, the claimants have a right to have their claims litigated and determined; and it is for a denial of this right that appellants claim that the decree of the Court below should be reversed.**

> "Where conflicting claims are made upon a trustee, he may maintain a bill *to settle the rights of the parties*, and for direction of the Court in the discharge of his duty."
>
> 22 Ency. Pl. & Pr. 64.

> "An interpleading bill is considered as *putting the defendants to contest their respective claims* just as a bill by an executor or trustee to obtain the direction of the Court on adverse claims."
>
> Angell *v.* Hadden, 16 Vesey 202.

Resembles Interpleader but of Wider Scope.

A bill for the direction of the Court on adverse claims is often spoken of as a bill in the nature of a bill of interpleader, see, for instance, Dan. Ch. Pr. 1572; but while such a bill resembles in many respects an interpleading bill, and in some respects is identical with it, it nevertheless involves another principle of equity, namely, trusts, and it has, therefore, a wider scope, and is free from many of the technical restrictions of strict inter-

pleader, particularly as applied to bailor and bailee, principal and agent, etc.

All such bills, however, contemplate the adjudication and settlements of the conflicting claims as well as the protection of the trustee; and indeed, from the nature of the proceeding, it is only by such adjudication that the trustee can be protected, except in the case where the trustee is permitted to resign and bring the thing in dispute into court.

Putnam *v.* Collamore, 109 Mass. 511.
Batchelder Petitioner, 147 Mass. 465.
2 Story Eq. Jur., 808.

In Putnam *v.* Collamore, Mr. Justice Wells, speaking for the Court, says:

> "It is not contended that this can be maintained as a bill of interpleader. It is brought under the rule allowing any one acting under a judicial appointment in charge of a trust who is threatened with suits, or otherwise embarrassed with conflicting claims, to apply to this Court for instructions in regard to the administration of the trust and for protection therein. Not only parties making formal claims upon the trustee, adverse to each other, but all persons supposed to have an interest in the subject-matter, or upon whom it is desired that the decision should be conclusive, may be brought before the Court *that they may set forth their claims or show cause against any disposition of the fund that may be proposed.*
>
> "It is not necessary for the maintenance of the bill that the plaintiff should set forth all the facts upon which the claims of the respective parties thus brought in may be finally determined.
>
> "The principal requisites are:
>
> "1. The fiduciary possession of a fund of which some disposition is to be made presently;

"2. Conflicting claims, or the probability that such may arise;

"3. No adequate means of determining them otherwise, so as effectually to protect the trustee from the risk of future liability or controversy."

This rule is applicable to a trustee under a deed as well as to one acting under judicial appointment.

Dimmock *v.* Bixby, 20 Pick. (Mass.) 368.

EFFECT OF NOTICE AND DUTIES AND OBLIGATIONS OF TRUSTEES RECEIVING NOTICE.

The effect of the notice was to prevent the Trust Company from parting with the stock in controversy except at its peril, and to make it a trustee thereof for the rightful owners, the appellants. The Trust Company, after receiving the notice, owed a duty and obligation to those claiming under the constructive trust as well as to those claiming under the express trust. Indeed, after the notice, any attempt on the part of the Trust Company to deal with the stock in controversy to the prejudice of the rights of the appellants would, it is submitted, have made it a privy to the fraud, and would have been an actual or a constructive fraud on its part.

Lewin on Trusts, 11th ed., Ch. XIV, Sec. VI, pp. 396, 397.

Sheridan *v.* Joyce and Fair, 7 Ir. Eq. Rep. 115.

National Bank *v.* Life Ins. Co., 104 U. S. 54.

Newton *v.* Porter, 5 Lansing (N. Y. Sup. Ct.) 416, 428, S. C. affirmed on appeal, 69 N. Y. 133.

"It is incumbent on the trustee," says Lewin in the passage referred to above, "to satisfy himself beyond doubt, before he parts with the possession of the property, who are the parties legally and

equitably entitled to it. He must, therefore, attend to all claims of which he has notice; and he may compel all persons who claim to be *cestuis que* trust to set forth their title."

"The necessity of seeing that the trust money reaches the proper hand is obligatory not only on trustees regularly invested with the character, but on all persons having notice of the equities, as if A lend a sum of money to B, and B afterwards discover it is trust money, he cannot pay it back to A, unless A, as trustee, has a power of signing a receipt for it."

In Sheridan *v.* Joyce & Fair, 7 Ir. Eq. Rep. 115, a person who had borrowed money from a trustee without notice of the trust was notified by the *cestui que* trust that it was trust money. Subsequently the borrower paid it back to the trustee under threat, as alleged, of legal proceedings: *Held*, under the circumstances, where fraud was shown, that he must pay the money to the *cestui que trust* notwithstanding his alleged previous payment to the trustee, and it was so decreed. In that case the Court said:

"Now the moment he had notice that the money was trust money, he became a trustee of it for the parties entitled."

Paramount Title.

This doctrine of liability on the part of a trustee by reason of notice extends to paramount titles. Thus Lewin, Ch. XIII, 25, 11th ed., p. 315, says:

"Though a trustee may not claim against his own *cestui que trust*, yet he is not bound to deliver over the property to his *cestui que* trust if he cannot

safely do so by reason of notice of title in another paramount to the trust."

See also Talbot *v.* Radnor (Earl), 3 Myl. & K. 252;
Neale *v.* Davies, 5 De Gex M. & C. 258;
Putnam *v.* Collamore, 109 Mass. 511.

Talbot v. *Radnor* was a suit to set up a will and establish certain trusts thereunder. As to one parcel there was a question respecting the validity of a recovery against the tenant in tail, one Gowland, and he was made a party to the suit. At the hearing Gowland's counsel stated that his client did not dispute the validity or resist the establishment of the will, but that he claimed by a title paramount to the will, and had, therefore, a right to proceed in an action of ejectment.

Sir John Leach, M. R. said:

"It appears to me that the defendant Gowland was properly made a party to the suit. The trustees having notice of the doubt as to the validity of the recovery could not safely proceed to the execution of the trusts of the will as to that particular estate until that doubt was removed; and *it is the duty of the Court by its decree to adopt such course for the protection of the trustees as shall have the effect of removing the doubt before it proceeds to deal with the estate as a part of the subject of the trust.* The validity of the claim being merely a question of law, the defendant Gowland has now a right to elect whether he will proceed in ejectment which he has commenced, or adopt such other course of inquiry as the Court may think proper to direct. * * * All that I can now usefully do is to declare the will proved, without directing the trusts of the will to be carried into execution, inasmuch as those directions will necessarily be affected by the result of the ejectment."

II. On Second Assignment of Error.

The requirement of giving a bond as a condition of asserting one's claim is something unheard of in a case of this kind, as it is in interpleader cases which follow the practice of bills by trustees for the direction of the Court on adverse claims. Only one instance has been found in which such a bond was required, and that was in an interpleader case, viz., Buck *v.* Mason, but in that case the defendant from whom the bond was required was in default, while here the appellants had answered fully, and it was the other defendants who were practically in default. Nevertheless, the order requiring a bond was held erroneous on appeal, 135 Fed. 304, 1905, and the Circuit Court of Appeals, commenting thereon, says:

> "The order to plead and give bond within such short delay was not only a hardship, but so far as we are advised was without precedent in bills of interpleader."

This requirement in the decree respecting a bond is, therefore, it is submitted, reversible error.

The Court seems wholly to have misconceived the function of a bond in a case of this character, and from whom and when it is required. Generally speaking, it is only proper to require a bond from the party or parties who receive the thing in dispute before the controversy is finally settled. Thus in Crane *v.* McDonald, 118 N. Y. 648, 656, the stakeholder offered to turn over the property to either party who would furnish him with a bond of indemnity, but as both claimants refused to do so, he brought his bill of interpleader.

Occasionally, a bond is required from the complainant as a substitute for bringing the money into Court. Thus

in Biggs *v.* Kouns, 7 Dana (Ky.) 405, 411, it is said that if the plaintiff does not bring the money into Court, he should at least give bond and security for its ultimate payment according to the decree.

Similarly, where the fund was paid over to one of the parties before the whole question was settled, as in Illinois Masons' Benefit Society *v.* Booth, 12 Fed. Cas. 1209, No. 7009 (1879), which was a bill of interpleader by an Insurance Company against the widow and son of an intestate and a foreign administrator, the Court says:

> "In view of the fact that this is simply an interpleader filed by the Society for the purpose of determining to whom the money shall be paid, without any special application on the part of the widow, I shall direct the money to be paid to the administrator" (a foreign administrator), "but upon condition only that he furnishes satisfactory security to hold it for the benefit of whom it may concern." * * * "And if this administrator will not comply with the order of the Court, then I shall direct the Society to hold the money, until letters of administration are taken out in this State."

Finality of the Decree and Inequity of the Order Requiring a Bond.

The decree was final and operative the day it was entered, without waiting for the expiration of the ten days allowed for obtaining a restraining order or injunction; for by it the appellants lost immediately and finally the right to bring suit, without injunction or bond, to charge the complainant as trustee. A suit to charge a person as trustee is a common suit of equitable cognizance; and that it does not require an injunction or a bond is plain when we consider that it can be brought

against a person after he has parted with the property in controversy as well as before.

Manhattan Bank *v.* Walker, 130 U. S. 271.

Not only is the decree inequitable for the foregoing reason, but it is also inequitable because it imposed a practically impossible requirement on the appellants as a condition precedent to their asserting any claim whatever against the Trust Company to the property in dispute. By reference to the record, (p. 23, fol. 42), it will be seen that the appellant company had exchanged all is property for stock in the defendant Planograph Company, and that it had been prevented by one or more of the other defendants who were, or had been, directors of said Planograph Company from selling said stock, and that it was without means and unable to furnish a bond, particularly so large a bond as would have been required, and that it was, therefore, impossible for appellant company to comply with the condition.

The Court has no discretion to exact a bond from either claimant as a condition of his asserting his right to the thing in controversy; and even if it had, it would be a peculiar exercise of equitable discretion to require those claimants who had answered and fully set up their claim and established it by proof, to put up a bond as a condition of their taking any steps in the cause, and in case of their inability to do so, to award the property to the claimants in default, who had neither denied the others' claim, nor asserted title in themselves.

III. On Third and Eighth Assignments of Error.

In the case of a trustee or executor, the title to the money or thing in dispute usually remains in him until the rights of the rival claimants are finally determined,

and a trustee or executor is, therefore, not generally required to bring the fund or thing in controversy into Court (Goodhue *v.* Clark, 37 N. H. 525). But where, as here, the trustee wishes to resign before the rights of the claimants are determined, it is submitted that the same necessity exists for bringing the thing in dispute into Court as exists in a case of strict interpleader; and that, therefore, it was the duty of the trustee in this case, for his own protection as well as for the protection of the claimants, to see to it that the stock in controversy was brought into Court before he took his discharge. Indeed, it was incumbent on him to see that an order to that effect was passed, if he wished to relieve himself of all liability. Where a trustee claims no interest in the subject-matter himself, and wishes to resign and be entirely relieved of his trust before the controversy between the claimants is settled, his case very closely resembles that of a plaintiff in strict interpleader so far as the duty of bringing the thing in dispute into Court is concerned.

This rule of interpleader which, it is submitted, is applicable here, is of the very essence of the remedy and is strictly construed.

In Williams *v.* Walker *et al.*, 2 Richardson (S. C.) 291, the law on this point is thus stated:

> "The complainant, in a bill of interpleader, should not only offer, by his bill, to pay the fund into Court, but he should take care to have an order passed to that effect, if he desires to protect himself from the liability for interest on the fund while it is in his possession. The rule is very explicit and well settled, that on a bill of interpleader, the plaintiff '*must bring the money into Court before he takes any steps in the cause*' (1 Smith Ch. Pr. 476). And in Pauli *v.* Von Melle, 8 Simons, 327, an order for an injunction

in an interpleading suit was declared to be irregular, 'if it did not make the issuing of the injunction dependent on the payment of the money into Court.'"

"From the proceedings before us, it does not appear that any order has been heretofore passed for the payment into Court of the fund in the hands of the complainants in the bill of interpleader, and provision to that effect will now be made."

Again, in Lamon *v.* McKee, 7 Mackey (18 D. C.) 446, 479, 480, the Court says:

"The very object of such a bill is to obtain leave to deposit the money and allow the contest to go on between the rival claimants. But such a decree should not acquit him of accountability for any other moneys he may have received; and accordingly the decree below, while declaring the plaintiff to be dismissed as a party to the suit, with his costs, further ordered that the decree was made without prejudice to the right of any and all of the defendants to institute any action in law or in equity to recover from the complainant any demands any of them may have for amounts due from him over and above the money so paid into Court. * * * We think the decree was a proper one, * * * and it is affirmed."

Farley v. *Blood*, 30 N. H. 354, is an instance of a case where a trustee, seeking relief against adverse claims, was required to place the thing in controversy subject to the order and control of the Court before he was granted his discharge.

The trustee in the case at bar had a very plain and simple remedy open to him by which the rights of all parties would have been protected. He could have resigned his trust and surrendered the property in dispute to the Court. In United States, etc. *v.* May,

4 Mackey (D. C.) 4, the Court says that a trustee may always resign and surrender his trust to the Court, and thereby be relieved of future liability.

IV. On Fourth and Fifth Assignments of Error.

The gravamen of the charges in the appellants' answers is that two of the directors of the appellant company, conspiring with a third person, succeeded in wrecking the company of which they were directors and securing its assets for a third company, and thereby wrongfully and fraudulently obtained for themselves a very large amount of stock in the new company. Unquestionably such officers were in equity constructive trustees for the company they had injured. This stock or the greater part of it, still impressed with this constructive trust in favor of the appellant company, was subsequently assigned and transferred to the National Savings and Trust Company, the complainant, and constituted a large part of the 35,005 shares of stock held by it as trustee. It is conceded that the National Savings and Trsut Company paid no consideration for the stock. That Company, therefore, was not a *bona fide* purchaser without notice, and it consequently took the stock charged with the trust. The doctrine of constructive trust as stated by Mr. Chief Justice Fuller in Moore *v.* Crawford, 130 U. S. 122, is plainly applicable to this case. There the Court, quoting from Story and Pomeroy, says:

> "Fraud, indeed, in the sense of a Court of Equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."
>
> 1 Story, Eq. Jur., 187.

"Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a Court of Equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or *in the hands of any subsequent holder* until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust."

Pomeroy, Eq. Jur., p. 1053.

This same extract from Pomeroy is quoted with approval by Mr. Justice Brewer delivering the opinion of the Court in Angle *v.* Chicago & St. P. Ry. Co., 151 U. S.,p. 27.

Similarly in Reynolds *v.* Aetna Life Ins. Co., 28 App. Div. (N. Y.) 591, 601, the Court, adopting the language of Tiffany and Ballard in their work on trusts, says:

"The law abhors fraud and will punish it by the administration of a wholesome justice in all cases; and even with stern justice in such cases as a moral and just sense would seem to demand. In equity the summary remedy is to convert the wrongdoer into a trustee, and the one whose rights have been invaded thereby into a *cestui que* trust, and then enforce the execution of the trust. Actual fraud implies an intention to be unjust or to do injustice through concealment or misrepresentation and actions designed to carry out such intentions. It implies a criminal intent and *taints the conscience of all parties and privies thereto.*"

See also National Bank *v.* Life Ins. Co., 104 U. S. 54; Moore *v.* Williams, 16 N. Y. Supp. 403; and cases cited p. 12, *supra.*

As to the duties and liabilities of directors, see Bosworth *v.* Allen, 168 N. Y. 157, 164 (1901); Koster *v.* Pain, 41

App. Div. (N. Y.) 443, 445 (1899); Wardwell *v.* Railroad Co., 103 U. S. 651, 657.

V. On Sixth and Seventh Assignments of Error.

The Court of Appeals in its opinion says:

> "They" (*i. e.*, the depositors who claimed under the express trust) "could not be forced to try title on the mere answer of defendants."

Just the contrary, it is submitted, is the regular and well established practice. The object of this form of action, as has been previously pointed out (see authorities cited under First and Second Assignments of Errors). is to compel the adverse claimants to *answer* and set up their claims in order that they may be adjudicated, and the trustee know to whom he owes the debt or duty.

The rule of equity procedure applicable not only to bills for instructions, but to bills in equity generally, is that when upon a hearing on bill and answer enough appears from the pleadings to enable the Court to determine the rights of the parties, it will proceed at once to decide the whole case, and make a final decree settling the rights of both complainant and defendants.

The following cases are instances of a final decree rendered at the hearing on bill and answers in the case of bills for instruction, viz:

Stevens *v.* Warren, 101 Mass. 564;

Sohier *v.* Barr, 127 Mass. 221;

See also Angell *v.* Hadden, 16 Vesey 202, *supra.*

Other illustrations may be taken from interpleader cases, as the practice in those cases follows the practice in the case of bills by trustees for instructions on adverse claims. Thus Mr. Justice Story says (2 Story Eq. Jur., see 822):

"An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill does which is brought by an executor or a trustee to obtain the direction of the Court upon adverse claims of different defendants. If, therefore, at the hearing, the question between the defendants is ripe for decision, the Court will decide it; and if it is not ripe for decision, the Court will direct an issue, or a reference to a master,to ascertain contested facts, as may be best suited to the case. Indeed, an issue or a direction to interplead at law would be obviously improper in all cases except where the titles on each side are purely legal. Equitable titles can only be disposed of by Courts of Equity; and even as to legal titles, it is obvious that in many cases a resort to an issue or an interpleader to be had at law would be unnecessary or inexpedient."

See also 23 Cyc., p. 32.

Further, in 23 Cyc., p. 27, it is said:

"Where no affirmative relief is sought against the complainant, a cross-bill is not admissible, for each defendant may have all the relief to which he is entitled upon his answer alone."

And on page 28, in a note, it is also said:

"A cross-bill in an interpleader suit is not necessary to sustain a decree for a successful defendant as against defendants who have defaulted."

Such was the practice followed in McNamara *v.* Provident Life Ins. Co., 114 Fed. Rep. 910, 913, decided by the Circuit Court of Appeals in 1902. That Court says:

"The defendant Loeb asserted title in his answer and established the same by full proof, and under the correct practice was entitled to a final decree, and no cross-bill against the defendants in default was necessary. And this seems clear when we notice

the fact that said defendants neither asserted title to the fund in Court, nor denied Loeb's title to said fund" (p. 912). "If one defendant in a bill of interpleader establishes his title and the other makes default, the Court will decree payment to the former and a perpetual injunction against the latter," citing authorities. "That this is the correct practice is declared in many adjudged cases" (see Richards *v.* Salter, 6 Johns, Ch. 445, and others).

"Richards *v.* Salter was decided by Chancellor Kent on a review of the practice and authorities, and we quote, as conclusive on the subject, from his opinion as follows:

"'The defendant, S., has answered, and set forward his right and title to the money, and the other defendants have not supported their claim. Upon this bill, the question of right may be decided in favor of one defendant against another. If one defendant establishes a title, and the other makes default, the Court will decree payment to the former, and a perpetual injunction against the latter.'"

According to the established practice of this Court in a case of this kind, the Court, in case of a reversal, will not simply reverse and remand, but will direct the Court below to enter the decree it properly should have entered in conformity with the pleadings. Spring *v.* South Carolina Ins. Co., 8 Wheat. 268.

It is submitted that the pleadings in the case at bar fully sustain appellants' claim to a constructive trust in their favor, and that the case is ripe for decision as to everything except the amount of stock due the appellants; and, therefore, that the decree of the Court below should be reversed, and that that Court should be directed to enter a decree in favor of the appellants to the effect that the complainant and the defendant-appellees are constructive trustees for the appellants of the stock

in controversy, and are ordered to account to them as such, with a reference to a master to state the account.

City Bank *v.* Bangs, 2 Paige (N. Y. Ch.) 570, 573;
Goddard *v.* Leech, Wright (Ohio) 476;
2 Story Eq. Jur., Sec. 822, *supra;*
Bank *v.* Prager, 50 W. Va. 660, 691;
Sage *v.* Culver, 147 N. Y. 241, 247;
Holland Co. *v.* Con. Gas Co., 85 Hun (N. Y.) 454, 457.

VI. On Ninth Assignment of Error.

The pleadings show gross fraud, and also that there are between twenty-five and thirty parties to the suit, some of whom are residents of the District of Columbia, while others reside in Virginia, West Virginia, New York and New Jersey. The bill contains a prayer for general relief. It is, therefore, submitted that, on these two grounds alone, viz.: fraud and the avoidance of multiplicity of suits, the Court should have retained jurisdiction of the case, including the stock in controversy, and have done complete justice between the parties.

In Atkins *v.* Dick, 14 Pet. 114, 119, the Court says:

> "The bill further charges the defendants with fraud, and this, too, is admitted by the demurrer. If there be any one ground upon which a Court of Equity affords relief with more unvarying uniformity than on any other, it is an allegation of fraud, whether proven or admitted. Whilst, therefore, a case stands before us upon such a bill and demurrer, we cannot hesitate to say that it must be considered as entitling the party to the aid of a Court of Equity."

See also 1 Story Eq. Jur., Sec. 186 and note, 187, 188; also 64*k*; 23 Cyc. p. 33;
Newton *v.* Porter, 5 Lansing 416, 428; S. C. 69 N. Y. 133;

Further, not only is the whole doctrine of bailor and bailee, paramount title, and independent agreement or liability, as applied to conflicting claims, most artificial and unsatisfactory, but it should also and particularly be borne in mind that this doctrine refers to strict interpleader and to legal titles, and has no application to bills by trustees for instructions, nor to equitable titles.

A few citations from the authorities will illustrate this point.

The familiar doctrine of bailor and bailee is thus stated in 23 Cyc., p. 14, and similarly in Story's Eq. Jur., sec. 819:

> "Where a person is in possession of property as bailee to which the bailor himself has no possessory title, but is merely a tortious possessor, and the rightful owner demands it of the bailee, the latter cannot compel the rightful owner and the bailor to interplead. He is himself liable to be deemed a wrongful possessor, if he should, after notice, withhold the property from the rightful owner. He must defend himself as best he can at law and is not entitled to the assistance of a Court of Equity to try *merely legal titles* in a controversy between different parties where there is no privity of contract between him and the alleged rightful owners. The hardship of the case has been frequently adverted to by the authorities."

To which Justice Story adds (sec. 820):

> "The true doctrine supported by the authorities would seem to be that in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a Court of Equity, for that would be to assume the right to try *merely legal titles* upon a controversy between different parties, where there is no privity of contract between them and the third

person, who calls for an interpleader. Whether it would not have been more wise and more consistent with the principles of equity, originally to have held that in all cases whatsoever, where the bailee was innocent and without any fault, he should have a right to a bill of interpleader, is a point into which it is now too late to inquire."

Again, on "independent liability," in the section referred to by the Court (sec. 1326) Pomeroy says:

> "Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants since one of them has a valid *legal* demand against him at all events."

To the same effect in Crawshay *v.* Thornton, 2 Mylne and Craig 1, Lord Chancellor Cottenham, denying strict interpleader, said:

> "If the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants *may recover against them at law*, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights against the plaintiffs."

Such, however, is not the case at bar. Here all the titles are equitable, and of such a case Justice Story says:

> "Where the title of all the claimants is purely equitable, there is a still broader ground to entertain a bill in the nature of a bill of interpleader; for Courts of Equity in virtue of their general jurisdiction may grant relief in such cases."
>
> 2 Story's Eq. Jur., sec. 808.

Again speaking of the narrow doctrine of paramount title, Pomeroy says (sec. 47):

> "Such being the doctrine, it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation and loss from independent claims to the same thing as well as from claims that are dependent; and there is certainly nothing in the nature of the remedy that need prevent it being extended to both classes of demands."

In the present case, however, it may fairly be said that the appellants' claim is a superior derivative claim rather than an independent paramount claim, not perhaps derived from contractual relations with the depositors, but from their tortious acts (*Crane* v. *McDonald*, 118 N. Y. 648, 657). But, however that may be, the doctrine of paramount title, as already stated, does not apply to equitable titles.

See further authorities cited under First and Second Assignments of Error.

Equity Rule 42.

The Court of Appeal, in its opinion (Record, p. 65, last paragraph) says:

> "Plaintiff set the cause down for trial on bill and answer. On hearing, and before judgment defendants, by leave of court, filed a cross-bill. It was attempted, by means of this bill, to, in effect, restrain any performance of the trust, under the agreement, either by the plaintiff or its successors in trust; and to prevent any sale of the stock, except upon condition that the proceeds should be held subject to the order of the Court. We cannot escape the conclusion that this was an attempt on the part of defendants to reap the benefits of an injunction without giving bond."

For the reasons already stated it is submitted that after the complainant had summoned the appellants into Court and required them to answer and set up their claims, they were then entitled to be heard and have their claims adjudicated. But leaving that question out of consideration for the moment, and assuming that they were not so entitled, they then certainly had the right to bring an original bill to charge the complainant as trustee for them of the stock in controversy (*Manhattan Bank* v. *Walker*, 130 U. S. 271) or to do the same thing by cross-bill. It seems unnecessary to say that a bill to charge a person as trustee does not require either a bond or an injunction.

To assume, therefore, because appellants asked in their cross-bill, filed by leave of Court, to have the complainant charged as trustee for them of the fraudulent stock in dispute, was an attempt on their part to reap the benefits of an injunction, without giving bond, seems to be an unnecessary reflection on appellants, as well as a misconception of their rights.

Again, the Court of Appeals, in its opinion, says:

> "If defendants were anxious to try title, which seems doubtful, they should have proceeded in a proper manner to have brought the holders of the trustee's certificates before the Court."

Briefly, in reply, it is submitted, first that all the parties were before the Court in the present suit, and that it was the contention of the appellants that all the issues could be tried there. Further, the appellants in this suit answered at the September Rules, September 5, 1907, while the defendant appellees did not answer till the 26th of the following November.

Moreover, the appellants had begun suit in West Vir-

ginia, the home State both of the appellant company and the Planograph Company which was a necessary party to the suit, and it was the defendant-appellees here who had interposed delay, not merely by failure to appear and answer, but by deliberately keeping out of the jurisdiction of the Court. (See Record, p. 53.)

While the record does not seem to show explicitly just when that suit was instituted, yet it may fairly be presumed that it was not begun until after June 12, 1905, the date of the request on the Planograph Company for an accounting (Record, pp. 24 and 45). Further it appears that many of the facts and circumstances on which the allegations in appellants' answer in this suit are based, were learned only through disclosures resulting directly or indirectly from the West Virginia suit, Record, p. 25.

Further the Court of Appeals says (Record, p. 67, end of first paragraph):

> "They," the appellants, "presented no objection to the transfer of the stock to the New York Trust Company, except to insist, in their cross-bill, that plaintiff should not be relieved of any liability imposed upon it by virtue of said notice."

This statement is clearly a mistake; and the Court seems to have entirely overlooked the fact that while appellants interposed no objection to the trustee resigning, it was their contention set forth in their *answer*, as well as in their cross-bill, that this relief could properly be granted, and the rights of all parties protected, only by the appointment of a receiver or trustee of the stock, who should hold it (or the proceeds in case of sale) subject to the control and order of the Court until the rights of the various claimants had been settled and determined. (See Record, pp. 25. (last paragraph), 55 and 56.)

VIII.

In suits by trustees or executors to obtain the direction of the Court on adverse claims the plaintiff must observe strict impartiality, not only in beginning the suit, but during the whole course of its progress. He may not resort to a court of equity to give an undue advantage to either claimant. Just as in bills of interpleader, as soon as the decree that the defendants interplead is made, and the plaintiff is paid his costs, he is wholly without the controversy; so "in a bill in the nature of a bill of interpleader brought by an executor or trustee to obtain the discretion of the Court as to the disposition of a fund in his hands," his "duty is performed when he has brought the parties in interest before the Court and he is not entitled to take part in the argument of the questions involved."

2 Dan Ch. Pr. 1572.

Houghton *v.* Kendall 7 Allen (Mass.) 72.

It is submitted that it is hard to reconcile with any true spirit of fairness or impartiality the course of the complainant in this case.

The complainant here, the Trust Company, is not in the ordinary position of a trustee who remains in the case until the rights of the various claimants have been determined, and then turns the property over to the true owner according to the decree. The Trust Company in this case seeks to resign and be discharged at once. It is, therefore, in exactly the position of a complainant in interpleader asking for a preliminary decree discharging him. It was, therefore, the duty of the complainant to bring the property into Court, and the decree was properly operative only as to so much of the property as was brought into Court. (See authorities cited under Third Assignment of Error.)

Not only did the Trust Company fail to do this, but it allowed to be passed, without objection or protest, a decree turning the property over to the very persons (or, what is the same thing, to their appointee) conceded by it to be the tortious and fraudulent claimants, against the rights of the true owners, without any hearing whatever on the merits. This seems clearly inconsistent with the obligations imposed on a trustee, whose duty it is "to satisfy himself beyond doubt, before he parts with the possession of the property, who are the parties legally and equitably entitled to it." (Lewin, *supra.*)

In conclusion, the case was forced to a final hearing by the appellees, who demanded a final decree in the presence of the cross-bill filed by the appellants, which cross-bill both the appellees and the Court ignored as demanding no consideration and not in the least inhibiting an immediate and definite disposal of the controversy.

Such being the case, no reason appears why this Court should refrain from a final decree. The case being a mere application of a trustee for instructions, the trustee must be instructed with regard to the facts shown by the pleadings. Having such regard, the only proper direction is that the trustee hold the stock for those parties who swear to their title, whose title is admitted by the trustee, and whose title is not denied by those in adverse interest.

It is accordingly submitted, then, that the decree appealed from should be reversed and the cause remanded, with direction to enter a decree for the appellants establishing the trusts in their favor, and awarding to them the stock in controversy.

CHARLES A. KEIGWIN,
GEORGE P. MONTAGUE,
Counsel for Appellants.

IN THE

Supreme Court of the United States

October Term, 1910.

No. 21.

[Oct. T., 1909, No. 192.]

THE MOORE PRINTING TYPEWRITER COMPANY, ET AL.,

vs.

NATIONAL SAVINGS & TRUST COMPANY, ET AL.

REPLY BRIEF FOR APPELLANTS.

STATEMENT.

This is a suit in equity brought by a trustee to obtain the advice and protection of the court upon the suggestion of adverse equitable claims asserted to the trust property in the hands of the complainant.

The bill, filed by the National Savings and Trust Company, one of the appellees here, shows that that company

New York Trust Company, the new trustee previously nominated by the depositors now answering.

No notice is taken in this answer of the answer filed by the Moore Company more than two months before; and, neither by this answer nor otherwise, at any stage of this cause, do these depositors deny the charges of fraud made against them or make any suggestion in favor of their own right to the stock.

On the same day, November 26th, the complainant set the cause for hearing on the bill and the answers. On December 13th the court rendered a decree which directed:

First. That the complainant deliver the stock to the trust company in New York named as trustee by the fraudulent depositors; and,

Second. That, upon such delivery, the complainant be discharged from all liability to all or any of the defendants in this cause in respect of the said stock (p. 58);

Unless the defendants, who are appellants here, one or more of them, should within ten days from the date of said decree, apply for and obtain, either by original bill or cross-bill, a restraining order or injunction with undertaking and security as required by Equity Rule 42, prohibiting the transfer of the stock.

FACTS AND COMMENTS THEREON.

At the expense of some repetition, a brief statement of some of the more important facts, with a few comments thereon, will, it is thought, elucidate the nature of the controversy, and show the urgent necessity of the aid of this Court to protect the rights and interests of the appellants.

The Moore Printing Typewriter Company in 1900, and long prior thereto, was a corporation owning certain valuable patents and inventions of Charles T. Moore in the arts of printing, typewriting, stereotyping, justifying, electro-

typing and kindred processes, and all his future improvements in those arts (Rec., printed page 16, Or. 28).

Early in the year 1900, Charles T. Moore and Henry L. Bryan, directors both of the Moore Printing Typewriter Company and the Linomatrix Company, an offshoot of the Moore Company, conspired with George R. Cornwall, another defendant in this case, who had full knowledge of the relations of the said Moore and Bryan to the Moore and Linomatrix Company, to wreck or injure the said companies for their own benefit and profit (Rec., page 16, Or. 29), and as the first step in their conspiracy, and as a means to carry out their fraudulent designs, they agreed to form a new company to be known as the American Planograph Company, which is also a defendant herein, in accordance with the scheme set forth in the three agreements between them, published as exhibits to appellants' answer (Rec., pp. 28-33, Exhibits B, C and D; Rec., pp. 16 and 17).

The Planograph Company being thus formed, and being without assets of any kind except some patents and applications for patents for transfer processes, of comparatively little value, contributed by the said Cornwall (Rec., pp. 18, Or. 32), they, the said Moore, Bryan and Cornwall, took a machine, which was the property of the said Moore and Linomatrix Companies, and had been constructed by those companies, and exhibited said machine secretly to various persons, representing it to be the property of the new company (The Planograph Company), and by reason of such exhibitions and representations succeeded in selling stock of the said Planograph Company and realized upon such sales a very large sum of money, upwards of $100,000 (Rec., pp. 18 and 19, Or. 33 and 34).

In the summer of 1900, they, the said Moore, Bryan and Cornwall, determined to suspend operations and take the

machine to "some convenient place," and have its design altered so that it would not be easily recognized, and call it for the future the Cornwall or Planograph printer, the object of any changes at that time being "to make the Cornwall machine look as little like the Moore model as possible yet cover all the patentable features in a practicable way." This was to be accomplished by the aid of the very draftsmen and mechanics formerly employed by the Moore Printing Typewriter Company and the Linomatrix Company to build the Moore model (Rec., pp. 18 and 19, Or. 33).

In the spring of 1901, the said Moore, Bryan and Cornwall approached the officers and directors of The Moore Printing Typewriter and Linomatrix Companies with a view of acquiring their property for the Planograph Company. They represented that the latter company was in a flourishing condition, that its stock had sold as high as $75 per share, that large capital was ready to come into the enterprise, that the patents and inventions owned by it paralleled those of the Moore and Linomatrix Companies; that while the Planograph Company could get on without the Moore and Linomatrix Companies, the latter companies owned some patents which might be useful to the Planograph Company, and a consolidation would be for the advantage of the three companies. They exhibited specimens of print actually made by the Moore or Linomatrix printer, as the work of the so-called Cornwall or Planograph printer (Rec., p. 19, Or. 34), and finally succeeded in acquiring for the Planograph Company the property of The Moore Printing Typewriter Company and The Linomatrix Company for 10,000 shares of the stock of the Planograph Company, *the said Moore and Bryan, two of the directors of the Moore Typewriter and Linomatrix Companies, securing for themselves, in addition to what*

they were rightfully entitled to receive, an amount of stock largely in excess of what those two companies received for their entire property, and the stock thus fraudulently acquired by the said Moore, Bryan and Cornwall constituted the greater part of the 35,005 shares held by the complainant company, and is directly traced into the possession of said company. A simple comparison of the notice given to the Trust Company (the complainant) with the deed of transfer of the stock to that company (See Exhibits A, B, and D of complainant's bill) shows how completely the stock in question is identified, the notice even giving, in most cases, the very numbers of the certificates so that they could be readily traced (Rec., pp. 21 and 22, Or. 39 and 40).

In addition to the Moore and Linomatrix Companies receiving 10,000 shares of the stock of the Planograph Company in exchange for their property, it was agreed that if certain negotiations then pending, which would bring in a large amount of capital to the treasury of the Planograph Company, failed, then 18,000 shares of Planograph stock should be reserved for the Planograph Company; and to carry out that condition the said George R. Cornwall, who represented that he owned at that time a very large majority of all the stock of the Planograph Company, made a declaration of trust to that effect. (Rec., pp. 46 and 20.)

The negotiations referred to did in fact fail except for a partial performance, and the said George R. Cornwall, instead of carrying out said declaration of trust in good faith, has either sold said 18,000 shares of stock for much more than he has accounted to the company, or else has sold part of said 18,000 shares for the amount he has accounted for, and kept a large balance for himself and his co-conspirators (Rec., pp. 22 and 23, Or. 41), aided and abetted by the directors of said Planograph Company and

especially by the President of the Planograph Company, E. M. Pease, another defendant herein, who, it is alleged, has participated in the profits made by the said George R. Cornwall by his manipulation of the said 18,000 shares (Rec., p. 24, Or. 43 and 44).

The defendants, who are appellants here, filed long and explicit answers September 3, 1907, as hereinbefore stated, and made charges of the most serious and damaging character, supported by specific proof, against the other defendants, or some of them; but none of such defendants filed any answer whatever till November 26, 1907, nearly three months after the answers of the defendants (appellants here) had been filed; and then they made no denial whatever of the truth of the charges made against them. There would seem to be but one conclusion to be drawn from such a course of proceeding, and to such a situation the language of the Supreme Court of Appeals of West Virginia in Bank vs. Prager and Son, 50 W. Va., 660, 691, 1902, is peculiarly applicable. The Court in that case (p. 691) says:

> "In Hefflebrown vs. Detrick, 27 W. Va., 17, Syl. 8, it is held: 'No rule of law is better settled than that a party having in his power to prove a fact, if it exist, which, if proven, would benefit him, his failure to prove it must be taken as conclusive that the fact does not exist.'
>
> "The bill, and amended and supplemental bills charge conspiracy and fraud in every unequivocal terms against the defendants, and there are many facts and circumstances and much evidence tending to show the truth of the allegations of the bill, much more than sufficient to remove the presumption of innocence, indeed, almost sufficient to convict in a case of criminal prosecution, and yet not one of them would appear as a witness to explain the circumstances and facts

> tending so strongly to support the allegations of fraud and conspiracy."

See also Sage vs. Culver, 147 N. Y., 241, 1895, where the Court says:

> "Parties holding relations of trust and confidence towards others such as these defendants occupy towards the plaintiff cannot ordinarily afford to admit by demurrer charges, though quite indefinite and uncertain, that they have made profit for themselves by means of transactions such as may fairly be gathered from the averments of the complainant."

Again, in Holland vs. Con. Gas & El. Co., 85 Hun, 454, the court (Cullen, J.) says (p. 457):

> "We think that a verified complaint even on information and belief as to some of its allegations within the knowledge of the defendant, when not met or denied, fully establishes the facts therein alleged, and the rights of the parties accruing therefrom."

But it is not merely by the inference from silence that the facts in this case are established, nor is it by means of vague and unsupported allegations that proof is made, but from the agreements and letters of the conspirators themselves, the genuineness of which is unquestioned.

A few illustrations from such papers will show the methodical and deliberate character of the conspiracy.

Thus, in January, 1900, just prior to the formation of the Planograph Company, which occurred February 6, 1900 (Rec., p. 17), we find Moore, who had before that time assigned to the appellant company all his inventions relating to typewriting, printing, justifying, etc. (except his bar or linotype patent which he had previously assigned to the Mergenthaler Linotype Company), and who had also

covenanted to assign all his future improvements thereon to said appellant company (Rec., p. 16, fol. 28), and who was, moreover, a director in that company, entering into an agreement to give to Cornwall his professional and technical services for the following purposes (see Rec., Ex. B, p. 28; also p. 16, fols. 29 and 30):

> "1st. To prepare applications for letters patent for certain inventions of said Cornwall and to prosecute the same to a final issue before the United States Patent Office.
>
> 2d. To inspect, supervise and advise all employees of said Cornwall engaged upon the work forming the subject-matter of said applications.
>
> 3d. To advise said Cornwall as to the purchase of other inventions and patents and make examinations of the records of the United States Patent Office in relation thereto.
>
> 4th. To assist said Cornwall in promoting a Company to develop his, said Cornwall's, inventions and to procure the necessary capital therefor.
>
> 5th. To bring and prosecute any and all suits in law or equity that may be necessary to defend or assert said Cornwall's rights under said patents, or to assist other counsel in so doing."

with a further provision that if he was successful in selling a certain amount of stock in the company that it was proposed to promote, he should then share equally with the said Cornwall in all emoluments of such promotion, whether "in stock, money, royalties or other considerations of whatever nature;" and still further, that if he continued to serve said Cornwall, or said corporation, he should receive for his services a salary of not less than $5,000 a year.

It is hardly necessary to add that the company thus proposed to be promoted was the American Planograph Com-

pany, which was incorporated on the 6th day of the following month, viz.: February 6, 1900.

Though it is stated "that nothing in this contract obligates the said Moore to invent for the said Cornwall," etc., yet "he does obligate himself to give his time and energies in promoting the interests of the said Cornwall, and not to use his time and services in inventing for himself or others during the time stated."

Clearly, such an agreement was not only inconsistent with his (Moore's) duty as a director of the appellant company, but it was also simply a means for evading his contract obligations to that company. Moreover, the agreement suggests that Moore's ideas and inventions are to be embodied in patents taken out in Cornwall's name, but it is left for the next contract to state that fact specifically.

The second contract (Exhibit C, Rec., p. 30) is more explicit. The paper opens with a recital of the scope of the respective inventions of the said Moore and Cornwall, as follows:

> "*Whereas*, The said Cornwall is the inventor of sundry improvements in and relating to the art of planographic printing, and of methods and processes for forming planographic designs, and means for transferring the same to printing surfaces, and for printing from such transfers, and has also made certain improvements in and relating to the plates, forms and presses used in printing from planographic designs,
>
> "*Whereas*, Charles T. Moore is also the inventor of certain machines for printing and justifying the printed lines, as well as of machinery for perforating composing ribbons and ribbons for justifying, which inventions are adapted to be used in planographic work and for preparing letter press designs for inkless or chemical printing":

that is to say, according to their own statements, Cornwall is the inventor of methods and processes relating to plano-

graphic printing, whereas Moore is the inventor of the perforating and composing machines and the machines for printing and justifying.

The paper then goes on to state that Moore is embarrassed by litigation, etc., and that, therefore:

> "It is mutually agreed by and between the said Cornwall and Moore that it is greatly to the interest of each that one alone should devote his time to working out the inventions, and that the other should give such advice and counsel as his long experience and intimate knowledge of the business will enable him to do; and to this end it is agreed that the said Cornwall is to devote his time to *inventing and constructing machines* for producing the planographic designs and the methods, processes and appliances for transferring and printing or reproducing the same, while the said Moore is to use his knowledge and experience in assisting the said Cornwall to obtain good and valid patents for his, Cornwall's, inventions, and is not to use the knowledge he obtains from the said Cornwall to make inventions of his own, but is to give said Cornwall the benefit of all ideas that may occur to him while preparing or assisting in the preparation of the specifications and claims for the applications for letters patent filed by the said Cornwall."

This, if it means anything, means that patents for printing and justifying machines, as well as those for planographic methods and processes, are to be taken out in Cornwall's name, and that Moore's ideas and inventions are to be incorporated in such patents, that is to say, that Moore's inventions are to be taken out in Cornwall's name in order to avoid his (Moore's) obligation to Appellant Company.

This contract, it is true, contains a provision (in the nature of a joker), "that nothing herein contained shall re-

quire the said Moore or Cornwall to convey any patent or property, or to render any service for which they are legally bound to any other person or corporation;" but even this provision is negatived by what immediately follows, viz.:

> "This agreement being intended to enable the said Moore to receive compensation for his personal services, intimate knowledge and long experience, and *to use the same in the interest of said Cornwall,* and *not in promoting his own inventions in opposition thereto and to enable the said Cornwall to realize on his inventions without threatened competition.*"

The 3d Contract (Ex. D., Rec., p. 33) shows the very large interest viz.: from one half to two thirds, that Moore and Bryan, two of the directors of the appellant company, had secured for themselves in the rival company organized by Cornwall and Moore, *i. e.*, the Planograph Company, as well as the rich harvest they expected to reap from that company, viz.: $100,000 to Moore, $100,000 to Cornwall and $5,000 to Bryan, and after that to the three in equal shares.

Turning to the letters of Moore and Cornwall, it is even more apparent that, while the real inventor of the printing machines was Moore, it was their deliberate intention to take out the patents in the name of Cornwall.

Thus in Cornwall's letter of July 9, 1900, addressed to Moore at Hotel Frontenac (Rec., pp. 37-39), we find him urging Moore to get out the patents as soon as possible. His language is significant:

> "The hang of any good big trade is on the patents."
>
> "Get that think trap in A No. 1 order."
>
> "Now I am going to make a suggestion in line with yours—Let's shut up shop at the end of this week.

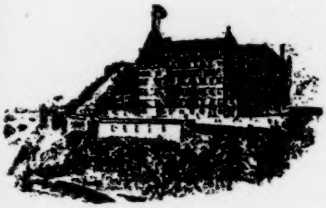
> Have Walter" (*i. e.*, Walter Gribben a former employe of appellant company who had built the "Moore" printer, see Record, p. 18, fol. 33) "with the mechanical and patent office draughtsmen join you at some convenient place and get everything ready to make the Domestic and Foreign patent applications as soon as possible."

And the climax is reached when in a letter written by Moore three days later at Hotel Frontenac, he unblushingly states that it is their intention to take the "Moore Model" apart (*i. e.*, the printing machine built by and for the Moore Typewriter & Linomatrix Companies in accordance with the inventions of said Moore, see Rec., p. 18, fol. 33), and have it reassembled in a disguised form but containing all the patentable features, and thenceforth calling it the "Cornwall Machine."

Moore's language is as follows:

> "CHATEAU FRONTENAC.
>
> "QUEBEC, CANADA, *July* 12, 1900.
>
> "From Cornwalls last letter it is quite evident that I will have to work with Gribben and a draftsman after next week how long the job will take I cannot say possibly ten days possibly 30 days. I am going to have Gribben take the machine apart and explain it to the draftsman, and have the latter draw as the machine is reassembled before his eyes making such changes as I can redily suggest, *the object of any changes at this time for patent purposes is to make the Cornwall machine look as little like the Moore Model as possible yet cover all the patentable features in a practicable way*. this I expect to do by Aug. 1st then I hope to have Gleason wherever I am and to get out the perforator & justifyer, and put the *Cornwall printer* in practicable shape for Gribben by Sept. 1st. Then I can tackle Gorman about Oct. 1st for big money, and go for the European patents."

(Facsimile of above)



Chateau Frontenac.

Quebec. Canada

July 12th 1900

from Connells last letters it is quite evident that I will have to work with Gibbon and a draftsman after next week how long the job will take I cannot say possibly ten days. possibly 30 days. I am going to have Gibbon take the machine a part and explain it to the draftsman, and have the latter draw as the machine is successively before his eyes making such changes as I can readily suggest. the object of any changes at this time for future purposes is to make the Connell machine look as little like the Moore model as possible yet cover all the patentable features in a practicable way. this I expect to do by Aug. 1st then I hope to have Gleason wherever I am sent to get out the perforator & justifyer. and get the Connell printer in practicable shape for Gibbon by Sept 1st Then I can tackle Forman about Oct. 1st for big money. and go for the European patents.

Kerr goes away for two weeks this Saturday He, like all of us, is tired out with the intense heat. I must admit I am pretty rocky myself & cant half do my work justice.

We will do our best to clean up all we can this week before Kerr goes.—The amt we can be sure of is the 1308. banked.—Stevens remaining 1000, & Puffers $3750 and after Aug. 1st Crawfords 3,750—in all $9,808. This should carry us through even if no more comes in.

Now I am going to make a suggestion in line with yours —Lets shut up the shop at the end of this week—Have Walter with the Mechanical & Patent Office draughtsmen join you at some convenient place & get everything ready to make the Domestic & Foreign patent applications as early as possible.

The hang with any good big trade is on the patents. If we have the applications in we can make a big go in any one of several directions with McLean or others as we may elect If the McLean deal should fall. I would suggest that we increase Our Capital to say $5,000,000—the limit in West Va.—& then with our patent applications filed we can sell all the stock we want to dispose of at 50c at least or make a big deal.

Now about the Foreign patents. A friend of mine—a German American. A Mr. Adler. wants to handle the Continental patents. He stands ready, he assures me, to put up with us—say $15,000 for an option for 6 months. from time we turn over to him a little machine to take abroad—to show his parties. We to put up the patents in "escro subject to his order when he pays us our price We havnt got as far as price yet I wanted to hear from you first. The territory he wants to cover is the Continent of Europe. not England or her Colonies. What price would you say? Of course the $15,000 is forfeited to us if he doesnt make the sale Here again we must have patent applications filed or ready to file before we can close a deal. He is a straight reliable man & means business

Now in regard to England and her Colonies. A friend of Kerrs, A Mr. Greig—the American representative of Pearson, wants to handle & through Pearson—He offers to have Pearson. or Carey his partner come over here &

see it on, say Sept. 1st or when we elect & says they will put up, say $20,000 to $25,000—or thereabouts, for an option to buy the English & Colonial rights wants six months time on option. What say you. What price shall we ask them?

There again it is necessary to have English and Colonial patents ready to file—

Now old man. wouldn't it be a good plan for us to devote our time between now and Sept 1st to getting patent applications &c in order? Also let Walter have his Vacation & all of us get thoroughly rested for the fall campaign? I ought to have some rest myself, the Doctor tells me.

The $9.808—will make things perfectly easy until Sept. 1st at least & with our affairs in good shape, by good shape I mean patent applications all ready to file all over the world. can immediately raise from $40,000 to $50,000 on the English and European rights & then, if we want to, can hold the American Co. for ourselves. until its bigger.

I carry out your instructions carefully as to exposing the machine & the boys are both posted as to the importance of letting no one in on any pretext

Now old man let me hear what you think is best to do If you can suggest anything different from what I propose I'm agreeable—always—as you know—We are in this fight for a fortune & if we stick to it, we will win for a dead certainty.

I don't know where Henry is—I heard from him last Monday, the 2nd from Medfield Mass. & nothing since. He said he was going from there to Cherry Valley—where that is I don't know—& then on the 5th would be in Milford—I sent a letter to Milford enclosing stock certificates for his Signature on the 5th but they havnt turned up here yet Fortunately Stevens, was willing to take my receipt in place of the stock itself

I will telegraph there tonight & see if I can. find him Have just as good a time as you can & *get that think trap in A No. 1 order.* I wish I were with you—from the bottom of my heart—I suppose you will come back to some cool place near N. Y. where Gribben & the draughtsmen can join you. I will want to run up & see you too. Don't

try to come to the city.—It is so hot that it might put you out again & you can't afford that, of all things. I have just observed the size of this letter, but it will have to go. Instead of the daily notes I expected to send, as I had no address, I give every thing for the week in one letter.

With kindest regards
Ever your
GEO R CORNWALL.

To
Chas T. Moore Esq
Hotel Frontenac
Quebec

Fraud is one of the principal grounds on which it is claimed the decree in this cause should be reversed; and in the case of fraud, a Court of Equity is untrammelled, and has the power to adopt any measures to circumvent the wrongdoer, and do justice between the parties.

> "As to relief against frauds," says Lord Hardwicke, "no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules how far they would go, and no further, in extending relief against it, or to define strictly the species and evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive."
>
> Lord Hardwicke's letter to Lord Kaimes June 30, 1759. Parke's Hist. of Chan., p. 508, Cited in 1 Story's Eq. Jur. 200, p. 186 note.

The language, too, used by the Court in Newton vs. Porter 5 Lansing (N. Y.) 416, 428 (affirmed 69 N. Y. 133), in establishing a case of constructive trust, is very much in point. There it is said:

> "The Court should not refuse to allow a party to recover the avails of property stolen from him on any

technical grounds, when the merits of the case clearly require that he should recover; and the Court should jump all technicalities, and be as astute in discovering a remedy in upholding the rights of such a party, as the thief is in contriving ways and means to cheat him out of his property, and the avails of it, *by changing the same from one kind to another, and placing it in the hands of third persons.*" See further Reynolds vs. Aetna Life Ins. Co., 28 App. Div. (N. Y.) 591, 601, 1898, likewise a case of constructive trusts where the foregoing passage is quoted with approval.

See also under "Ninth Assignment of Error," Brief pp. 25 and 26, and authorities there cited.

ARGUMENT.

The stock in controversy is, according to the showing made by this record, the property of the appellants.

The Trust Company, complainant below and here one of the appellees, by setting the cause for hearing on bill and answer, admits the averments of the appellants as to their title and as to the fraud of the depositors from whom the Trust Company received the stock. Those depositors, Cornwall and others, who are by the appellants in their answer charged with fraud, for purposes of present argument at least admit the charge by their failure to deny, and by pressing for final decree upon the record as it stands.

The purpose of the proceeding is to obtain a decree which shall have this two-fold effect:

1st. To enable the fraudulent depositors to retain possession and control of the stock, by sending it to a new trustee in a foreign jurisdiction; and,

2nd. To foreclose all claims which the present appellants, the rightful owners of the stock, may have against the Trust Company on account of its trusteeship, that is to say, to destroy the constructive trust in favor of the appellants which is impressed upon the stock in the hands of the Trust Company.

The bill discloses that the fraudulent depositors have requested the Trust Company to send the stock beyond the jurisdiction of the Court; that the Trust Company is willing to do so; but that it is unable to do so "without risk of liability and loss, except through the aid of this court" (p. 4). The sole purpose, therefore, of the appeal to equity is to enable the Trust Company and its depositors to perpetuate the fraud, and at the same time to shield the Trust Company against the consequences of violating the constructive trust which it admits to exist in favor of the appellants.

The method by which this purpose was to be accomplished,—and which has been approved by the two courts below--was, to file a bill for instructions to the trustee; to implead both claimants of the stock, and thereby elicit an answer which should develop the controversy as to the title; then to insist that the court should ignore the existence of that controversy and award the stock to the admittedly fraudulent claimants; and finally, to obtain a decree which should determine the title to the stock in favor of the depositors charged with fraud.

The question, therefore, presented by this record is, whether, upon a trustee's bill for instruction, disclosing a controversy affecting the title to the trust property, it is competent for the court to direct the trustee as to the disposition of the property without adjudicating the title.

I.

The notice given on May 22, 1906 (p. 12), by the appellants to the Trust Company, is the only reason for the bringing of this suit. The sole object of the bill, and the sole effect of the decree, is to enable the Trust Company to relieve itself of such liability as was by that notice imposed upon it.

Either that notice was effectual to create a liability against the Trust Company, or it was not.

If the notice was not so effectual, then there was and is no excuse for the present suit, and no justification for the decree entered herein. Unless the appellant's assertion of title to the stock fixed upon the Trust Company some responsibility for proper disposal of the trust property, as by imposing upon the stock a constructive trust, or by casting a cloud upon the title, the application to the court was wholly unwarranted, because there was nothing against which any relief was needed, and there was no relief that could, to any useful purpose, be granted.

It will not be suggested that every person who is threatened with a suit, or upon whom some notice is served or some demand made which may lead to litigation, is entitled to invoke the protection of equity against the threat, notice or demand, and to ward off the danger of suit by reporting the matter to the chancellor.

Unless the notice of claim served upon the Trust Company had some effect to create a liability, it was the company's duty to ignore the notice, and restore the stock to its depositors, without regard to the adverse claim asserted. It would be mere trifling with the court to pray a judicial license to do what there was no reason for not doing, and to ask for a decree against a mere assertion of title. In that view of the matter, the only proper decree in such a case as this would be one of dismissal.

On the other hand, if the effect of the notice was to create any liability at all, then such liability could not be discharged except by an adjudication against the validity of the claim asserted. The mere statement to the court that the Trust Company was embarrasssed by conflicting claims to the stock would, of itself, not enable or entitle the court to relieve the company of its embarrassment. Unless

the court was appealed to for an adjudication, the court could have no concern or authority in the matter. The only judicial relief that can be afforded to anybody is by an ascertainment of rights; and, if in this instance the Trust Company did not know what it ought to do with the stock, the only way in which the court could help it was by a judicial ascertainment of the title to the stock.

It would be strange indeed if any man, who had intentionally or unwillingly incurred a liability, could discharge himself by merely telling the chancellor about it. It would be stranger still if, in such a case, the chancellor could, upon the matter being reported to him, dispose of the difficulty without any examination of the grounds upon which the complainant is sought to be charged.

Yet this is what the court below has undertaken to do. The decree appealed from proceeds upon the theory, that it was the right and the duty of the Trust Company to restore the stock to its depositors, without regard to any adverse title that had been, or might be, or could be, asserted against those depositors. Although the appellants had been subpœnaed to answer the Trust Company's statement of its troubles, and had asserted under oath that the stock was their property, and the Trust Company had admitted that assertion, the decree awards the stock to the depositors whose title is thus challenged without any regard to the proof offered by the appellants, or the other possible means of determining whether the stock rightfully belonged to one or to the other set of opposing claimants. And whatever rights the appellants had acquired as against the Trust Company were summarily foreclosed without any consideration of the facts or the other grounds which established or might have established their paramount title to the stock and the liability to them of the Trust Company.

This decree, in thus blankly disregarding the sworn averments of superior title in the appellants, is of course a ruling that no assertion of such title could be considered by the court, and that admitting the appellants had established title to the stock in themselves, the court should, notwithstanding, award the property to the adverse claimants who had no title.

And this of course amounts to a holding that, upon a trustee's application for instructions, the title to the property is immaterial, and the trustee must in all cases be directed to restore the property to the person from whom, however disentitled, the trustee happened to receive possession. As the opinion below states the principle:

> "The claim affected the title to the stock, for the return of which plaintiff was bound by its contract to one of the parties" (p. 67).

II.

If this principle is correct, and the Trust Company was bound to restore the stock to the fraudulent depositors, notwithstanding their alleged want of title, there was no occasion or excuse for bringing this suit.

If the court, upon the mere statement of the case, was bound to disregard the conflict of claims and direct the stock to be restored to those from whom it came, that must be because the Trust Company was bound without a decree, thus to restore the stock. In that case, the Trust Company, knowing the law as well the court, could proceed as well without the direction of the court as with it, and was bound to do so.

It would be a novel proposition to assert that anybody and everybody, who is in doubt as to what he should do, may state his difficulties in a bill and take the advice of a court upon the law.

It would be stranger still to say that any one who is embarrassed by conflicting claims to property in his possession may summon the opposing claimants into court and have one of them forever silenced without regard to the comparative merits of the two claims. Counsel who write can understand that, in a proper case, a bailee or a trustee may, by an interpleader or by a proceeding in the nature or after the analogy of interpleader, cause himself to be relieved of liability by an adjudication of the antagonistic claims. But, if the case is so simple and the rights of the opposing parties so well defined by some principle of settled law, that no adjudication is necessary, then neither a bailee nor a trustee nor any one else can require or obtain the protection of equity.

The court below treated the present case as governed by a clear and well settled principle of law, which defined the duty of the trustee and left no room for embarrassment on account of conflicting claims. If it is the duty of every trustee to return the trust property to the hands from which he took it, and this rule operates independently of the merits of any adverse claim asserted to the property, then this trustee had no more right to be advised as to its duty than a man would have who should inquire of a court whether he should pay a debt for which he declared himself to be legally liable.

The decree appealed from embodies two contradictory views of the law. One is, and it is distinctly asserted, that the complainant trustee was bound to restore the stock to its depositors because it had contracted to do so, and without regard to the merits of any claim adverse to the depositors that might be asserted. Hence the stock is decreed to be restored to the depositors, though their title is controverted, and though the Trust Company admits that their possession was fraudulently obtained. The other

proposition, which is implied in the decree, is that the Trust Company was subjected to some liability by the appellants' assertion of their title to the stock in the company's hands. Hence this liability is discharged and the appellants forever silenced by the direction that the company shall be quit of all claims which the appellants may have or might assert against it.

These propositions are obviously irreconcilable and mutually exclusive. If the Trust Company was, by law, under all possible circumstances, bound to return the stock to its depositors, because as against them no one could assert a claim that would compromise the trustee, then there could be no liability upon the trustee, and there was nothing to foreclose. If, on the other hand, there was something in the nature of the case which might fix a liability upon the trustee, and so require the trustee to be protected against the appellants, that must be because the Trust Company's duty to restore the stock to its depositors was not absolute and altogether independent of the claim asserted by the appellants.

If the Trust Company's duty was to ignore the notice given it by appellants and restore the stock to those who deposited it, that must be because the notice could not by any possibility make the company responsible to the appellants for the proper disposal of the property. If that is true, it was idle and unwarranted to declare that the company should never be held responsible to those who gave it a merely nugatory notice of an ineffectual claim.

If, on the other hand, the Trust Company was in anywise endangered by the notice given, that must be because the notice imposed upon the company some responsibility for the proper disposal of the stock. In that case, the Trust Company could not part with the stock except by informing itself as to the title or else referring the question

to the court; and the court could not, any more than could the company, dispose of the stock without determining the title.

III.

The notice given by the appellants to the complainant Trust Company fixed upon the company a liability to account to the appellants for the stock.

As between the appellants and the Trust Company this proposition is not open to debate in this cause, because both parties have agreed that the company was charged by the notice with liability to the appellants for any wrongful disposal of the property. The bill asserts that the company cannot part with the possession of the stock without risk of liability and loss. Indeed, as has been pointed out, this suggestion constitutes the sole ground of the complainant's appeal to the court for relief.

If the case were in a court of law, and involved only legal titles to be governed by strictly legal principles, the Trust Company would, by reason of the notice given it by the appellants, be bound to ascertain the true ownership of the stock, and could not dispose of that property to either claimant except at the risk of liability to the other.

The Trust Company in such case, according to its own account of the affair, would be in the situation of a bailee of stolen goods upon whom both the dishonest bailor and the true owner are pressing their demands for surrender of the property. Or, eliminating the company's admission of the appellant's title made by setting down the cause, the bill would then state the case of a bailee upon whom has been served notice of a claim adverse to that of his bailor.

The law as to the liability of a bailee in such case is as old as the Year Books. To what extent and in what manner he may obtain relief may be a matter of doubt; but

it is beyond question that a third party's notice of title adverse to that of the bailor puts the bailee into a position where he parts with the goods at his peril and under liability to account to the true owner: 5 Cyc., 212.

The bailee must not surrender to his bailor goods which belong to a third person if he have notice of the true ownership. If he does so under such circumstances he is liable to the rightful owner.

Browne on Carriers, p. 221.
Ogle vs. Atkinson, 5 Taunton, 759.
Wells vs. Express Co., 55 Wisconsin, 23.
Doty vs. Hawkins, 6 N. H., 247.
Gallaher vs. Cohen, 1 Browne (Pa.), 43.
Nelson vs. Iverson, 17 Alabama, 216.
Walden vs. Karr, 88 Ill., 49.
McAnelly vs. Chapman, 18 Texas, 198.
Hoffman vs. Carow, 22 Wendell, 285.

The appellants, therefore, by notifying the Trust Company of their title to the stock deposited with the company, created in their own favor a liability against the company. This action imposed upon the company an obligation to account to the appellants for the value of the stock; and this obligation could be discharged only in one of two ways; by delivery of the stock to the appellants as the true owners, or by standing suit and disproving the title of the appellants.

Either of these courses was attended by certain embarrassment and inconvenience and possible loss to the Trust Company. And whether the Trust Company adopted one course or the other, the right of the appellants to hold it to account was valuable to the appellants, and was a right moreover to which they were entitled by unquestionable law.

asking relief against claims of equitable nature? And it is submitted that in such a case, the jurisdiction is clearly broader and the procedure less restricted than in the case of a mere bailee and of merely legal property.

The answer filed by the present appellants, as defendants to the bill, states a case of clear constructive trust in their favor, in virtue of which case the complainant company holds the stock as trustee for them.

The title to the stock held by the depositors thereof, who created the complainant company their trustee, is shown to have been obtained by conspiracy, deception, suppression of the truth, and a multifarious violation of fiduciary relations, which constitute actual fraud of the grossest character. As between these depositors and the appellants, according to the undisputed averments of the present record, the equitable title to the stock is incontrovertibly in the appellants.

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it and who is considered in equity as the beneficial owner." Pomeroy, Equity Juris., Sec., 155.

> "Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has

jurisdiction to reach the property either in the hands of the original wrongdoer, or *in the hands of any subsequent holder* until a purchaser in good faith and without notice acquires a higher right and takes the property relieved of the trust."

Pomeroy, Eq. Jur., p. 1053.

These two extracts from Pomeroy are quoted with approval by Mr. Justice Brewer delivering the opinion of the court in Angle vs. Chicago & St. P. Ry. Co., 151 U. S., p. 26, and the latter by Mr. Chief Justice Fuller in Moore vs. Crawford, 130 U. S., 122.

Other authorities to the same effect are:

Nat. Bank vs. Ins. Co., 104 U. S., 54.
Long vs. Buford, 26 Fed. Rep., 241.
Van Alen vs. Bank, 52 N. Y., 1.
Newton vs. Porter, 69 N. Y., 133.

In the case first above cited the Court quotes with approval this passage from the case of Pennell vs. Deffell, 4 De G., M. & Gr., 372:

> "I apprehend, it is an undoubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust."

And this comment on that passage made in *ex parte* Dale, 11 Ch. Div., 772:

> "Does it make any difference that instead of trustee and *cestui que trust*, it is a case of fiduciary relation-

ship? What is a fiduciary relationship? It is one in which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust.* If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own."

V.

The notice of their equitable title to the stock, given by the appellants to the Trust Company, therefore, made the company responsible for the proper disposal of the stock.

This supposed responsibility or "risk of liability and loss," as it is called in the bill, is stated as the sole ground for the Trust Company's appeal to equity (p. 4). It might, accordingly, be supposed that the fact of the company's liability as trustee should be assumed without argument.

The court below, however, while recognizing the alleged risk as sufficient ground for obtaining a decree, passed a decree which imports that the complainant company was charged with no liability at all by the assertion of a constructive trust in favor of the parties giving the notice. And the opinion of the court states this as the ground for the decision, namely, that the Trust Company was not bound to recognize or consider any claims to the stock except those of its depositors, for whom it was trustee under an express trust.

If the notice of the appellants' title created a constructive trust in their favor, to the extent that they had a title to the property, then the Trust Company, as trustee for them, became bound to see that they obtained whatever of the trust property they were entitled to.

This results from the undoubted nature of such a trust and from the well settled and clearly defined duties of a trustee, whether holding under an express, or holding under a constructive, trust.

In Lewin on Trusts, 11th ed., ch. XIV, p. 396, the rule is thus stated:

> "It is incumbent on the trustee to satisfy himself beyond doubt, before he parts with the possession of the property, who are the parties legally and equitably entitled to it. He must, therefore, attend to all claims of which he has notice; and he may compel all persons who claim to be *cestuis que trust* to set up their title."

> "The necessity of seeing that the trust money reaches the proper hand is obligatory not only on trustees regularly invested with the character, but on all persons having notice of the equities, as if A lend a sum of money to B, and B afterwards discover it is trust money, he cannot pay it back to A, unless A, as trustee, has power to sign a receipt for it."

Other authorities, notably Sheridan vs. Joyce, 7 Irish Eq., Rep., 115, cited on appellants' original brief filed herein, confirm this principle and exemplify its application.

Indeed, it is only the liability thus imposed upon a trustee by notice of adverse claims to the trust property which warrants a court of equity, in affording him instruction, and in protecting him by itself undertaking to decide between the conflicting claims of parties asserting themselves to be equitably entitled to the trust property. And in this very case, as has been suggested, the assumption that the trustee was, by the assertion of adverse claims to the stock, exposed to "risk of liability and loss" is the very ground upon which the court below was appealed to for relief and upon which it assumed jurisdiction.

That court, however, in holding that the Trust Company was bound to restore the stock to its depositors because it had contracted so to do, in effect denied the principle that a trustee is obliged to deliver the trust property to those who are equitably entitled thereto. In so holding, the court not only abandoned the only ground upon which its jurisdiction could be predicated, but disregarded the clear rule of equity jurisprudence applicable to such cases.

If a trustee is bound, always and in all circumstances, to deliver the trust property to the person from whom, as *cestui que trust*, the property was received, no constructive trust can ever be enforced. If every trustee must deal with trust property according to the terms of the express trust upon which he takes it, and without regard to any constructive trusts of which he acquires notice, then not many trustees can require instruction, and there is an end of the jurisdiction in cases of constructive trust.

VI.

It was not the duty of the Trust Company to redeliver the stock to its depositors, as a matter of course, and without regard to the adverse claims asserted by the appellants.

The court below held that such was the duty of the company because such was its contract with its depositors, the principle thus asserted is clearly and essentially at variance, as has been pointed out, with the principles applicable to constructive trusts, and also with any possible theory of jurisdiction to direct a trustee in such a situation as the present.

This proposition is inconsistent also with the authorities hereinabove cited, as, for example, with the rule laid down by Mr Lewin, *supra*, that it is incumbent upon the trustee to see that the trust property is placed in the hands of those who are legally and equitably entitled to it.

The decided cases also clearly show that there is no such rule as that assumed by the court below. Some of these cases, particularly those bearing upon the procedure in such actions as the present, are hereinafter cited with reference to the procedure herein followed. In all of them it is evident, and in some it is stated, that they are all grounded upon the theory that the trustee cannot exonerate himself by simply doing what he has contracted with his original *cestui que trust* to do. In all of them it is assumed that the trustee, by conforming to his instructions, may expose himself to trouble; and it is for the sake of saving the trustee such trouble as may result from claims adverse to those under whom he holds that equity assumes jurisdiction to direct and protect him.

In Neale vs. Davies, 3 De Gex, MacN. & G., 258, decided in 1854, the complainants had accepted certain stocks upon certain trusts, and had executed a deed declaring that they held and would hold the fund upon the trusts designated. Nine years later the trustees, having acquired no new information on the subject (as appears from the dissenting opinion of L. J. Knight Bruce), they notified their *cestuis que trustent* that they would not turn over the fund until an adverse claim should be settled. The trustees accordingly filed a bill for instruction, which was held to lie.

Lord Justice Turner:

> "It is true that the trustees accepted the fund upon the trusts of the settlement of 1831, but there is a doubt whether it ought to be held on those trusts. It is said that they knew of this doubt when they accepted the trusts; but I take it to be the law, that if a trustee has accepted a fund upon certain trusts, and then receives information making it doubtful whether he ought to execute those trusts, he has a right to come to the court for its direction, whether the trusts ought to be executed. How is the case altered by his knowing of the

existence of this doubt at the time when he accepts the trusts? It may be altered in this respect, that he may be liable for the consequences of his having accepted the trusts; but it cannot, in my opinion, be altered so as to bind him to apply the fund to purposes at variance with the trusts to which the fund is subject, or on which it ought to be held.

"Suppose a person accepts a fund on certain trusts, and then another, claiming the fund under a paramount trust, gives notice of his claim to the trustee, and says that he will hold the trustee personally liable if he deals with the fund in a manner contrary to the paramount trust. Could the trustee, in the face of such a notice, transfer the fund to the *cestuis que trustent?* In the case which I have put, if all the *cestuis que trustent* claiming under the paramount trust were adult, the trustee might protect himself by giving them notice, that if they do not within a reasonable specified time take proceedings to enforce their claim, he should proceed to distribute the fund according to the trusts which he had declared; for then, if the paramount *cestuis que trustent* did not institute a suit, he would, as I apprehend, be indemnified."

In this case, the trustee did not, in accordance with the suggestion of Lord Justice Turner, give to the appellants such a notice as would put them to an active assertion of their claim. Such a notice might—though the case cited does not so determine—have obliged the appellants to institute proceedings for the establishment of their title, but it certainly could not limit them to any one form of action, *viz.*, a suit by bond and injunction, instead of bill to charge the property with a trust, or other appropriate proceeding.

In fact, in this instance, the trustee chose to take the initiative, and, acting in a view to its own interest, put the appellants to show their title. The court, upon such showing being made, ignores it, and holds that, by this device, an adjudication may successfully be avoided

In any view, and irrespectively of the qualifying suggestion attached to the opinion, the case of Neale vs. Davies is clearly against the principle assumed by the court below, and establishes the rule that a trustee is bound to attend to all claims asserted against the trust property in his hands.

See other cases cited in the original brief under "First Assignment of Error," particularly Talbot vs. Radnor, Brief, p. 14.

VII.

The purpose of a trustee's bill for instruction is to cast upon the court the duty, originally incumbent upon the trustee, of ascertaining the title to the property.

This results necessarily from the nature of the case in which the trustee is assailed by conflicting claims to the property. If it were his duty to redeliver the property to those from whom he received it, without regard to the assertion of an adverse title, then there would be no risk of liability to him in doing so, and no occasion for him to ask, or for the court to give, him advice. If, on the other hand, as the law clearly is, it is the trustee's duty to ascertain who is entitled to the property, then the only possible excuse for a resort to equity is to obtain assistance in such ascertainment. Upon being appealed to by a trustee for instruction in such a case, the court is bound to do what the trustee was bound to do, inquire how the property should rightfully be disposed of.

Otherwise it would result that the ascertainment of the title, which was the duty of the trustee, could be avoided by merely referring the matter to the court. This is just what has been successfully done in this case. The trustee being embarrassed by the "risk of liability and loss," occasioned by the assertion of conflicting claims, has stated the situation to the court. The court, instead of relieving the

trustee by itself undertaking to determine who is entitled to the stock, has disposed of the matter by telling the Trust Company to ignore the conflict of claims and to follow the terms of the express trust upon which the stock was delivered to it. This instruction is put upon the ground that, the case being in court, the contract of deposit must be followed because it is a contract, and there is no necessity for an adjudication as to the title. In this way the trustee has been exonerated of the duty to ascertain the true owners of the property by the intervention of the court; and, since the court declined that duty, the necessity of any inquiry has been altogether avoided.

The result is that any trustee, who is charged with the duty of seeing to the proper, legal and equitable disposal of the trust property, may escape that duty by merely telling the court about it. If the trustee is discharged by reporting the matter to the court, and the court may dispose of the property without doing what the trustee was bound to do, then the duty to ascertain the true title to the trust property, which we have seen to be incumbent upon the trustee, can never be enforced.

In this view of the law, it is more than ever difficult to see why there should be a resort to equity in such a case. If the duty of the trustee is what the court below says that it is, and is so clearly defined and so well settled as is assumed in the opinion of that court, why should he need instruction? If the only purpose of the application to the court is to exonerate everybody, the trustee and the chancellor alike, from inquiry as to the title to the property, why should not the universal rule be laid down that no such duty is incumbent upon any trustee? In that way the courts would not be troubled with suits which are merely matters of form, and of which the events are predetermined.

So long, however, as the law remains as it is, that it is the duty, primarily, of the trustee to ascertain who is en-

titled to the trust property, the trustee can be exonerated only by himself assuming the responsibility of such ascertainment, or else by requesting some court to assume that duty for him. And, so long as courts respond to such appeals of trustees, they can relieve the trustees only by undertaking to adjudicate the titles which occasion the embarrassment of the trustees.

How else is the court to arrive at such understanding of the merits as will enable it to give proper instructions? A judge is not, by reason of his being a judge, clairvoyant so as to know the rights of the cause without evidence and even without allegation. A court cannot evolve correct instructions *ex visceribus suis,* and without information or suggestions from the contending claimants. The chancellor to whom the trustee appeals for advice probably knows less about the facts and the pretensions of the opposing claimants than does the trustee himself; and the only ground upon which the court can be required to direct the disposition of the property is the fact the court can, and the trustee cannot, bring the opposing parties before it and compel them to submit their claims for decision.

VIII.

Upon a trustee's bill for instruction, the titles of the parties defendant must be stated, litigated and adjudicated as in cases of interpleader.

The court below stated that the contention of the present appellants was that the bill in this case was one of interpleader. The court held that the case was not a proper one for interpleader. The court thereupon granted upon this bill just the relief which was sought by the defendants opposed to the present appellants (pp. 66, 67).

The effect of the ruling below is that, since the Trust Company could not maintain a bill of interpleader, it could

have such relief as it desired by merely stating its difficulty to the court. Upon the same ground it seems to have been supposed that the court would discharge its full duty in the premises by directing the company without any consideration of the opposing claims which made the company's difficulty.

It is easy to see how the inability to maintain a bill of interpleader might leave a party without any mode of relief at all. It is not easy to understand why the absence of a remedy by interpleader should entitle a party to judicial advice without an adjudication of anything.

A trustee, certainly, by reason of his being a trustee, may have equitable relief in many cases wherein one not a trustee could not claim the ear of the court. And one of the oldest grounds of equity jurisdiction is the existence of trust relations. Upon this ground, equity courts take jurisdiction in such cases as the present. Nor is it necessary in such a case that the trustee, in order to have relief, should state a case of interpleader, or show that he would, were he a mere bailee, be entitled to that mode of relief.

But it does not follow, nor has it ever been held, that a trustee in such a case at this may obtain instruction and relief without causing the opposing claims by which he is embarrassed to be adjudicated.

Nor has it ever been held that, upon a trustee's application for instructions in a case of conflicting claims asserted to the trust property, a court may instruct him without any inquiry as to the title to the property.

On the contrary, in all such cases, the court ascertains and adjudicates the title after the manner of procedure upon a bill of interpleader. Or, rather, to state the rule more correctly with reference to the true relation of the two cases, upon a bill of interpleader the court adjudicates the opposing claims after the manner of procedure followed

in cases of bills for the instruction of trustees, and adopted in that class of cases apparently before there was such a thing as interpleader.

In Angell vs. Hadden, 16 Vesey, 202, the Master of the Rolls said:

> "An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill by an executor or trustee to obtain the direction of the court upon the adverse claims of the different defendants."

So laid down also in 2 Daniell's Chan. Pl. & Pr., 16, 76 (3d Am. Ed.).

Here, it will be observed, the court does not assimilate the practice on trustees' bills to that in interpleader cases, as would be natural if the latter were an original class of cases out of which the former had developed, but *vice versa*. The procedure upon interpleader is illustrated by reference to that adopted in the instruction of trustees, as a practice of older standing, to which interpleader had been made to conform.

It may, therefore, be inferred that the jurisdiction to instruct trustees, and the procedure in such cases, were things of much more ancient origin than the jurisdiction to grant relief by way of interpleader. Indeed, it may be conjectured that the whole system of interpleader was suggested by the antecedent practice of giving relief to trustees who were embarrassed by conflicting claims to trust property, and that interpleader itself is but an extension, with some limitations, to other parties of principles originally held applicable only in the case of a trustee.

It is clear, at any rate, from the language used in Angell vs. Hadden and adopted by the textbooks and other authorities, that, on bills for the instruction of trustees respecting

cedure in such cases, but from the fact that, from time immemorial, in all such cases, and as a settled practice in such cases, parties have been forced to try their titles upon their opposing answers for the sake of exonerating trustees. The precedents are believed to be entirely uniform to this effect in all cases wherein trustees have applied for relief from the embarrassment occasioned them by the assertion of conflicting claims to trust property.

Putnam vs. Collamore, 109 Mass., 509, was a bill brought by an administrator *cum testimento annexo*, who was also a trustee under the will, praying instructions as to the disposition of a certain fund held by him in one or the other of these characters. The defendants were the complainant's *cestuis que trust*, who claimed the fund as belonging to the trust, and a creditor of the estate, who insisted that the fund should be treated as assets in the hands of the administrator. In overruling a demurrer to the bill, the court said:

> "It is not contended that this can be maintained as a bill of interpleader. It is brought under the rule allowing any one, acting under judicial appointment in charge of a trust, who is threatened with suits, or otherwise embarrassed with conflicting claims, to apply to this court for instructions in regard to the administration of the trust, and for protection therein. Not only parties making formal demands upon the trustee, adverse to each other, but all persons supposed to have an interest in the subject matter, may be brought before the court, *that they may set forth their claims, or show cause against any disposition of the fund that may be proposed*
>
> "It is not necessary for the maintenance of the bill that the plaintiff should set forth all the facts upon which the claims of the respective parties thus brought in may be finally determined. The principal requisites are:
>
> "1. The fiduciary possession of a fund, of which some disposition is required to be made presently;

"2. Conflicting claims, or the probability that such may arise;

"3. No adequate means of determining them otherwise, so as effectually to protect the trustee from the risks of future liability or controversy."

Goodhue vs. Clark, 37 N. H., 525, was a bill brought by an executor to obtain construction of the will, the persons claiming adversely to each being made defendants, and their answers setting up their respective claims. General reflections to the answers.

Bell, J.:

"The bill is an application by an executor to the court for their direction in regard to the proper performance of his duties. It is of the nature, in many respects, of a bil of interpleader, but it is not strictly a bill of that class, since the executor cannot bring the subject of the controversy and the parties who claim it before the court, and there leave them to litigate the matter among themselves. He is still bound to act in his official position, and must remain a party to the close of the controversy, while the plaintiff in a bill of interpleader seeks only a decree that the bill has been properly filed and may then retire from the case.

"The bill is filed upon the well settled principle of equity, that any trustee, placed in circumstances in which he may have reasonable doubt as to the disposition of the funds in his hands, has a right, for his own safety, to apply to a court of equity for directions, making the persons interested parties to the proceeding. Curtis vs. Chandler, 6 Mad., 123; Jones vs. Stokell, 2 Bland, 409; Heyden vs. Marmaduke, 19 Miss., 403; a principle always held equally applicable to the case of an executor or administrator; Rogers vs. Ross, 4 Johns. Ch., 608; Irving vs. Dickey, 9 Paige, 533 [and other cases].

"The principle by which cases of this sort are governed is stated by Woods, J., in Farley vs. Blood, 30

N. H., 362, agreeably to Angell vs. Hadden, 16 Vesey, 202:

"'Questions arising on bills of interpleader are disposed of in various modes, according to the nature of the question and the manner in which it is brought before the court. An interpleader bill is considered as putting the defendants to contest their respective claims, just as a bill by an executor, or a trustee, to obtain the direction of the court upon the adverse claims of the defendants. Therefore at the hearing, if the question between the defendants is ripe for decision, the court decides it; and if not ripe for decision, directs an action, or an issue, or a reference to a master, as best suited to the nature of the case.'"

"It is well settled that a trustee under a will may bring his bill in the nature of a bill of interpleader, and obtain instruction from the court as to his duty, when different parties are making adverse claims in relation to the trust property, and he is in doubt as to their rights. Or he may refuse to act in favor of either, and leave them to bring their bill against him for failing to execute his trust." Sprague vs. West, 127 Mass., 571.

Stevens vs. Warren, 101 Mass., 564, was a bill of interpleader brought by an administrator, having in his hands the proceeds of an insurance policy of the life of his intestate, against two defendants, of whom one claimed the said proceeds as assets of the estate, and the other claimed the same fund in virtue of an assignment made by the intestate in his lifetime. The court said:

"It is not properly a case for interpleader. But the plaintiff sustains a two-fold relation to the fund. If the claim of the defendant Warren can be maintained, either at law or in equity, it is not like an ordinary demand against the estate, which will be barred at the end of two years if not sooner prosecuted. It would be

against the plaintiff personally, and not as administrator. He is not only liable to be harassed by conflicting claims, but exposed to the risk of being required to settle his accounts, and distribute or pay over the fund as administrator, before his liability to the other claimant is brought to a determination at law. In such a case the administrator may properly ask the direction and protection of the court. Dimmock vs. Bixby, 20 Pick., 368; Treadwell vs. Cordis, 5 Gray, 341."

Accordingly, in this case, a decree was rendered upon the facts as established by the bill and the answers.

Morse vs. Stearns, 131 Mass., 389, was a bill of interpleader brought by an administrator *cum testamento annexo* against two defendants, both of whom claimed a legacy under the will. The defendants were required to interplead, and the court said:

"There is no doubt that it is a proper subject for a bill of interpleader."

Shaw, C. J.:

"The object of the bill, on the part of the plaintiffs as executors, is to obtain the advice and direction of this court as a court of equity, in the execution of several trusts annexed to their office of executors by force of said will * * *

"We have no doubt that the equity jurisdiction of this court, given by statute in all cases of trust arising in the settlement of estates, is broad enough to extend to cases where the trustees are actors, and seek the aid and direction of a court of equity, where there is doubt and difficulty, and where there are conflicting claims on the part of different parties to the same property or rights, under the instrument by which such trust is created. It has been so

held in the analogous case of a trust created by deed *inter partes*. Dimmock vs. Bixby, 20 Pickering, 368. And the same doctrine was applied to trusts under a will in the recent case of Hooper vs. Hooper, 9 Cushing, 127."

"The general principle upon which relief and direction are claimed is, that trustees are entitled to the protection of a court of equity in the execution of their trusts. This is a familiar principle of equity, and ought to be liberally applied in all cases where the security of trustees, acting fairly, may require the application.

"Whenever a trustee doubts as to his safety and security in complying with any claim of a *cestui que trust*, or doubts as to any other matter arising in the execution of his trust, his only prudent and safe course is to wait for the directions of a court of equity.

"The common course in such cases is for the trustee to decline acting without such a sanction, leaving the *cestui que trust* to bring his bill to compel the execution of the trust. But it does not seem to be material whether the trustee be plaintiff or defendant, the object of the application to the court in either case being the same." Dimmock vs. Bixby, 20 Pickering, 368.

Citing:

Brooks vs. Reynolds, 1 Bro. C. C., 183.

Curteis vs. Chandler, Maddock & Geldert, 123.

Buccle vs. Atleo, 2 Vernon, 37.

In this District, a trustee may have such relief as was sought in this case by resigning his trust and depositing the trust property with the court. United States vs. May, 4 Mackey, 4.

In such a case, manifestly, any one who claims the property as *cestui que trust* must prefer his claim to the court; and if there be conflicting claims, the court must decide between them upon such statements of title and evidence in support thereof as the contending parties may offer.

This scheme for the relief of a trustee is, it is clear, essentially one of interpleader, or one after which the procedure in interpleader cases is modelled; and it is substantially a requirement that titles shall be tried upon opposing answers.

X.

In requiring the defendants who are now appellants to sue out an injunction and give a bond to the complainant, the decree exactly reverses the true positions of the parties and imposes an utterly unwarranted condition upon the appellants' right to sue the Trust Company.

The single purpose of the complainant, as professed in the bill, was to exonerate itself from a burdensome and dangerous responsibility by foreclosing the appellants' right to hold it accountable to them for their property in its possession.

The burden of the Trust Company's complaint was that it was liable to be sued by the appellants for the value of the stock which it held and which it admitted to be the property of appellants.

The decree provides that this conceded right of the appellants to recover their property shall be forever barred unless they shall within ten days bring a certain suit in a particular form and give a bond to indemnify the Trust Company against any loss which it may sustain by reason of being sued.

Considering that all statutes of limitation allow from one to three or four years, and sometimes much more, for the institution of such actions, the court's allowance of ten days is, to say the least, a remarkably stringent limitation on the appellants' right to sue.

But how did the court obtain any authority to prescribe any period of limitation whatever? The right of appel-

lants to sue the Trust Company was certainly not derived from the decree. If they had any right to sue, it must have been given them by some provision or principle of law, and not by the grace of the court. That being so, it is difficult to see how the court could impose any limitation upon a right of action which existed, if it existed at all, independently of the court, and which could be limited only by the authority by which it was created. If the appellants had no right to sue, then the court had no power to create such a right; and in that case it would make no difference whether the appellants undertook to sue in ten days or in ten years. In either case, whether the right to sue existed or did not exist, no court could say that it did or did not exist until the appellants should attempt to sue and thereby present the question in a concrete case for judicial consideration.

The requirement that the appellants should proceed by injunction and give a bond was even more unwarranted. If the appellants had a right to hold the Trust Company accountable for their stock in its possession—and that is the very grievance of which the company complains—then the appellants were entitled to select their own form of action according to their own judgment and their best advice. If they had no right to hold the company, then the court had no power to give them a license to sue by injunction or in any other way. In either case, the right to sue and the propriety of the form of action adopted could not be judicially determined until a suit should be brought.

To say that a bond must be given as an indispensable condition to the exercise of appellant's right to sue the Trust Company was an unprecedented exercise of power on the part of the court below. The appellants had, on the case as stated by the bill, a right to hold the company to account for their stock in its hands. By the act of the

company in setting the cause for hearing on bill and answers, it was admitted that the stock was their property. The only logical decree, therefore, was that the Trust Company should forthwith surrender the stock to the appellants. Instead of this, the court decrees that the Trust Company shall send the stock to New York unless the appellants shall in ten days give a bond of equivalent value to protect the company pending the prescribed litigation.

All this manifests upon the part of the court below a complete misapprehension of the relative positions of the several parties to the record. If the appellants had brought a suit against the Trust Company, and if in that suit they had sought to restrain the company from disposing of the stock, and if they had adopted the remedy of injunction, in that case, very possibly, the complainants might have been required to supply a bond. In such a situation, the appellants seeking affirmative relief would have been actors and might have been obliged to make reasonable provision for the protection of the presumably innocent defendant from the injurious incidents of the litigation.

But *non constat* that they would have chosen that form of action. They had a right to bring suit, without injunction or bond, to charge the Trust Company as trustee for them, or to resort to any other appropriate remedy, and the court could not deprive them of this right by limiting them to any particular form of action.

In this instance, however, the appellants were not plaintiffs. They had not brought a suit of any kind against the Trust Company. It was the Trust Company that was the actor, the institutor of the litigation, and ostensibly the sole beneficiary of the suit. It had appealed to the court in its own interest, for the sake of relief from its own distress, and with a view to obtaining a substantial benefit for itself. To that end it had impleaded the appellants,

and demanded that they explain to the court upon what ground they considered the complainant their debtors.

What followed? The appellants, being thus summoned, promptly responded, and set forth their claim by answer in accordance with what they deemed to be the best equity practice (see McNamara vs. Provident Life Ins. Co. *et al.*, 114 Fed. R., 914; Putnam vs. Collamore, 109 Mass., 511), and showed their right to the property in controversy. Subsequently, as a precautionary measure, they filed a cross-bill. Therefore, when the decree was given, the appellants had already complied with all its requirements except that of giving a bond. They had asserted their right both by answer and cross-bill. They had been summoned into court to state their claim, and they had stated it. But the court arbitrarily decrees that they shall not be heard, and that their property rights shall be foreclosed, unless within ten days they apply for and obtain a restraining order or injunction with undertaking and security. The decree does not assure them that they will be granted such restraining order even if they apply for it within ten days and furnish a suitable bond. They must *apply for* and *obtain*, or their rights will be forever barred.

But that is not all. The bond required was a prohibitive one. The condition imposed was impossible of performance. By referring to the affidavit of value attached to the record (Rec., p. 69), it will be seen that one of the appellees herein stated in open court that the property in suit was worth several hundred thousand dollars at least Consequently, a very large bond would have been required. But the appellant company not only was unable to give a bond, but it had been deprived of its property and the means of procuring a bond by the very persons to whom, in case of its failure to comply with the condition imposed, the property in controversy was to be awarded. (Rec., p. 23, fol. 42; Brief, pp. 16 and 17.)

Thus it appears then that after the appellants had been summoned into court and had answered, a requirement, impossible of performance, was imposed upon them as a condition precedent to their being heard. Surely, such a proceeding is not an adjudication of rights, but a mere travesty of justice. Appellants' constitutional right to be heard has been denied them, and their property taken without due process of law.

In Hovey vs. Elliott, 167 U. S., p. 414, L. Ed., 42, p. 220, Mr. Justice White quotes the following passage from the opinion of the court, delivered by Mr. Justice Field, in Windsor vs. McVeigh, 93 U. S., 277, viz.:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is not only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and when he has appeared, saying, Your appearance shall not be recognized, and

> you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence";

on which he (Mr. Justice White) makes the following comment:

> "This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded an opportunity to be heard. Thus, Coke (2 Inst. 46), in commenting on the 29th chapter of Magna Charta, says: 'No man shall be disseised, etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition), or by the law of the land (that is, to speak it once for all), by the due course and process of law.'"

On this question of requiring a bond, see further under "Second Assignment of Error," Brief, pp. 15-19.

XI.

The decree appealed from should be reversed, and the court below instructed to enter a decree declaring the appellants entitled to the stock to the extent of the equitable ownership asserted by them in their answers.

A final decree is called for by the record, and the court below should be directed to enter such a decree in accordance with the admitted and undisputed averments of the parties. No issue of fact having been made, it remains only to determine what disposition of the property in contest is dictated by the facts as they are agreed.

The decree to be entered should declare the appellants entitled to the stock to the extent of the trust in their favor stated in their answers. To such a decree none of the appellees can object.

So far as the Trust Company is concerned, such a decree is precisely the action which it has invited. The company disavows any claim to the stock and all knowledge of th true ownership, professing entire disinterestedness as between the opposing claims. Upon the assertion by the appellants of their title, it enters an admission of their averments. The company, therefore, has no color of objection to being decreed a trustee for appellants, and by logical necessity no other decree is, as to it, possible.

The other appellees are likewise concluded of anv possible pretensions to title in themselves. Being brought into court upon a bill to determine the disposition of the stock, they have not asserted any claim to the property, and have been silent in the face of the charge that their possession was obtained by fraud. Upon this record, therefore, they ask no consideration whatever on account of their possession, but submit to the court the naked question, as to what shall be done with property to which they assert no claim.

It would be manifestly impossible to affirm the decree of the court below awarding the possession of property to such mere non-claimants. It seems equally out of the question to remand the cause for further inquiry. Not only have the appellants supported their claims by proof of the most convincing character, but the depositors have not, either by their pleadings or by other conduct, manifested any desire to vindicate their possession of the stock. On the contrary, that is the very thing which they have most sedulously sought to avoid. It is clear that this suit was brought in their interest and in the form most desired by them, and that the capital object of the whole proceeding is to enable

any aspect, the bill was good, as one in the nature of a bill of interpleader. One of the defendants having answered and made proof, and the other having made default, a decree was entered in favor of the defendant answering, the court citing: 2 Daniell, Ch. Pl. & Prac. (5th Ed.), 1494; 2 Beach, Mod. Eq. Prac., s. 638; Richards vs. Salter, 6 Johnson Ch., 445; Plaster Co. vs. White, 44 Michigan, 25; Badeau vs. Rogers, 2 Paige, 209. See further, brief, pp. 22-25, under "Sixth and Seventh Assignments of Error."

If it be said, and said correctly, that this is not a case of interpleader, the answer is that it is a case of instruction to a trustee respecting adverse claims, which is older than interpleader, and is the original from which interpleader is derived, and upon which the procedure in interpleader cases is modeled; whence it is clear that the rules of decision are identical in the two cases.

The present case is ripe for determination upon the record. It was forced to final hearing by the appellees, who demanded a final decree in the presence of the cross bill filed by the appellants, which cross bill both the appellees and the court ignored as demanding no consideration and not in the least inhibiting an immediate and definitive disposal of the controversy.

Such being the situation, no reason appears why this court should refrain from a final decree. If the case be a mere application of a trustee for instructions, as it is represented, then the trustee must be instructed with regard to the facts shown by the pleadings. Having such regard, the only proper direction is that the trustee hold the property for those parties who swear to their title and support it by proof, whose title is admitted by the trustee, and whose title is not denied by those in adverse interest.

It is accordingly submitted then that the decree appealed from should be reversed and the cause remanded, with di-

rection to enter a decree for the appellants, establishing the trusts in their favor and awarding to them the stock in controversy.

IN REPLY PARTICULARLY TO BRIEF FILED IN BEHALF OF APPELLEES, THOMPSON & NORTON.

Point 1. As to Finality of Decree.

The present appeal is from a decree of the Court of Appeals. That decree was unquestionably final. Moreover, the Court of Appeals held that the decree of the court below was a final decree. The appellees took no cross-appeal, and cannot raise this point now as they can only be heard in support of the decree. It is a well settled rule of this court "that an appeal brings up for review only that which was decided adversely to the appellant," and that appellees "can only be heard in support of the decree as it stands." London vs. Taxing District of Shelby Co., 104 U. S., 771, 774; 26 L. Ed., 923, 924.

However, the decree of the court of first instance was final:

(1) For the reasons stated by the Court of Appeals in its opinion; and

(2) Because by it the appellants were restricted to a particular form of action, viz.: a suit with bond and injunction, and were immediately, at the time the decree was rendered and before the expiration of the ten days, finally deprived of their right to bring suit to charge the Trust Company as trustee for them, without injunction and bond. (See appellants' brief, pp. 16 and 17.)

Further the only case cited in support of the position that the decree of the lower court was not final is a case de-

cided by the same Court of Appeals that decided this case, and at the same term, but prior to the decision herein.

Point II.

First, the averments here referred to as characterizing interpleader are all such as may be waived and are none of them of the essence of the action.

Cobb vs. Rice, 130 Mass., 231.

The material allegations of a bill of interpleader are stated in Crane vs. McDonald, 118 N. Y., 648, 654, as follows:

1. That two or more persons should have preferred a claim against the complainant;
2. That they claim the same thing;
3. That the complainant has no beneficial interest in the thing claimed;
4. That he cannot determine without prejudice to himself to which of the defendants the thing belongs.

Therefore, while the bill omits some of the non-essential averments of a bill of interpleader, it sets forth the material allegations of a bill of that character.

As the equity jurisdiction in the case of a trustee asking instructions of the court respecting adverse claims is broader and of wider scope than mere interpleader jurisdiction, it is not very important in the present instance whether the bill is regarded as a bill of strict interpleader, or in the nature of interpleader, or analogous to interpleader. Nevertheless, it is submitted that in a proper case a trustee may maintain strict interpleader. At least one of the present justices of this court, while he refers the equitable jurisdiction of the court to the more general ground of trusts, yet speaks of the *remedy by interpleader* as appropriate to the case of a trustee asking for instructions.

Thus Mr. Justice Holmes, in Order of Golden Cross vs. Merrick, 163 Mass., 374, says:

> "The remedy by interpleader is so beneficial, has been resorted to so commonly in cases of this sort, and the somewhat analogous but not identical jurisdiction under bills for instruction by trustees, has been carried so far in this commonwealth, that we are disposed to resolve any doubts in favor of the plaintiff."

In Goodhue vs. Clark, 37 N. H., 525, the court says:

> "This is an application by an executor to the court for their direction in regard to the proper performance of his duties. It is in the nature, in many respects, of a bill of interpleader, but it is not strictly a bill of that class, since"—note the reason—"the executor cannot bring the subject of the controversy and the parties who claim it before the court, and there leave them to litigate the matter among themselves. He is still bound to act in his official position, and must remain a party to the close of the controversy; while the plaintiff in a bill of interpleader seeks only a decree that the bill has been properly filed and may then retire from the case."

The reason assigned above would seem to imply that if the executor or trustee wished to resign, or to be wholly eliminated from the case, or if nothing remained of the trust (or of that particular part of it which related to the property in controversy) except to see that the property in dispute reached the hands of the rightful owners, strict interpleader would lie; and in support of this position, we find that in Farley vs. Blood, 30 N. H., 354, this same court allowed strict interpleader in the case of a trustee seeking relief from adverse claims, and before discharging the trustee required the property in controversy to be placed subject to the order and control of the court.

Loziers' Ex. vs. Van Sann's Admr., 3 N. J. Eq., 325, and Morse Adm. vs. Stearns *et al.*, 131 Mass., 389, are likewise instances of interpleader allowed in the case of executors and administrators.

THE APPELLEES' NEXT SUGGESTION

is that the bill discloses facts which make an interpleader impossible, and the brief proceeds to say that—

> "It is elementary that one who is bound by an express contract cannot interplead the person to whom he is so bound and a stranger who claims under an antagonistic or paramount title," citing Pomeroy's Eq. Jur. (3d Ed.), 1326 and 1327 and notes;

and the *non-sequitur* that is implied, and which seems to have been adopted by the court, is that because the complainant is liable under an express contract to one of the parties, that fact in some way impairs or defeats the rights of the true owner who holds by a paramount title. No argument is necessary to show the fallacy of such a conclusion. See Hentz vs. The Idaho, 93 U. S., 575, where it is held that the title of the true owner of personal property cannot be impaired by the unauthorized acts of one not the owner.

While it is claimed for the reasons hereinafter stated that this doctrine of personal obligation has no application to the case at bar, it may be well to state it in order to show that even if it were applicable, it is erroneously applied.

Crawshay vs. Thornton, 2 Mylne & Craig, 1, decided by Lord Chancellor Cottenham in 1837, is the leading case on this subject, and the one to which all authorities refer.

The facts in that case are briefly as follows:

R, who was agent for Daniloff, deposited a large amount of iron with Crawshay & Co. who were wharfingers, and

afterwards directed them to deliver it to Thornton. In response to a letter from Thornton, Crawshay & Co. sent him a memorandum of the weights of the iron, and notified him that they held it for his account, and had transferred it on their books into his name.

Crawshay & Co. subsequently received notice from Daniloff that the iron belonged to him, and that he had deposited it with R as his agent for sale, and that he (R) had, without authority, pledged it to Thornton.

Both Thornton and Daniloff made formal demands for the iron, and subsequently each of them brought trover against Crawshay & Co., who thereupon filed a bill of interpleader against them, to which Thornton alone demurred.

R in the meantime had gone into bankruptcy, but neither he nor his assignees made any claim respecting the iron.

On these facts the court held that the plaintiffs could not maintain interpleader, and that the bill must be dismissed, and Crawshay & Co. were thus left to defend themselves as best they could against the double liability.

The Chancellor says:

> "If the plaintiffs have come under any personal obligation, *independently of the question of property*, so that either of the defendants *may recover against them at law*, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights against the plaintiffs."

And again, page 20:

> "Mr. Daniloff might obtain a verdict by showing his title to the iron; and Mr. Thornton by showing that Messrs. Crawshay had come under a personal liability by their dealings with him independently of the question of title."

The court also adds:

> "A party may be induced by the misrepresentation of the apparent owner of property to enter into personal obligations with respect to it from which he may be entitled to be relieved by a court of equity; but such a case could not be the subject of interpleader between the real and pretended owner."

The decision, therefore, amounts to this:

1. That it is only applicable when the plaintiff has come under some personal legal (as distinguished from equitable) obligation to one of the claimants, which obligation is independent of the question of property.

2. That in such a case interpleader will not lie, and that a bill of that character, if seasonably objected to, should be dismissed.

3. That though a person who is under such special legal obligation may not maintain interpleader, yet if he has entered into the obligation on account of the misrepresentations of the apparent owner, he may have equitable relief against the enforcement of the obligation.

Costello vs. Martin, 1 Ir. Law R. Eq., 50, is a good illustration of this principle.

4. That if he cannot maintain interpleader, and has no equitable ground for having the independent legal obligation set aside, then he has incurred a double liability, namely a liability under his contract independent of the title to the property, and also a liability to the true owner for the property itself.

It should be particularly noted that while a court of equity may relieve one from the obligation of a special contract, if that obligation is obtained by means of misrepresentation or fraud (Costello vs. Martin, *supra*), no court can relieve him from his liability to the true owner who

claims under a paramount title, though that is precisely what the court has attempted to do in this case.

In Costello vs. Martin, 1 Ir. Law R. Eq., 50, 1867, *supra*, the Master of the Rolls held that although a stakeholder who had entered into a new contract binding at law with one of the rival claimants might not be able to maintain interpleader, yet if such contract had been obtained by misrepresentation, he could maintain a bill in equity; and the stakeholder, upon paying the fund into court, was granted the same relief that he could have obtained from interpleader, namely, injunctions to restrain the actions at law brought against him by the rival claimants.

The misrepresentation was that of a married woman who represented herself to be a widow.

The facts are these:

Money was lodged in a bank on deposit receipts in the names of E, the wife of F (who at the time of lodgment represented herself to be a widow), and M. E and M went to the bank and discharged such receipts for a new one in the name of M alone, E still representing herself as a widow. The money originally lodged was admitted by E and M to be the money of W. F apprised the bank that E was his wife (but he did not do so till after the deposit receipt had been given to M), and brought an action against the bank for the money which was originally lodged by E. M also brought an action against the bank on the deposit receipt. Held, as the deposit receipt to M had been obtained on a misrepresentation, the bank was entitled to an injunction to stay the actions.

The bank, among other things, prayed that the fund it held might be declared a trust fund, and that it might be permitted to bring in and lodge the same in court.

The court says (p. 57):

"I find nothing in the authorities to warrant the doctrine that a plaintiff who would be entitled to seek the protection of this court against rival claims only for some new alleged obligation, is debarred from showing that that obligation is not binding on him. On the contrary, when such a case is referred to Crawshay vs. Thornton, Lord Cottenham thus deals with it (p. 19): 'A party may be induced by misrepresentation of the apparent owner of property to enter into personal obligations with respect to it from which he may be entitled to be released by a court of equity.' He adds, no doubt, that 'such a case would not be a proper subject for interpleader between the real and pretended owners'; but it is plain he considered the party deceived would have some remedy in equity."

Again (p. 59):

"But assuming that these authorities establish that where an applicant has come under an independent obligation to one of the claimants, which must be impeached and got rid of before a proper case for interpleader arises, and the case is not one for relief within the interpleader act at law, it by no means follows that no suit can be framed in this court applicable to such circumstances, and upon which complete relief may be given. The preliminary question may be improper to be decided in an interpleader case, but a very proper subject for an equity suit.

"The contract with Martin having been—as I must at present consider it was—procured by a misrepresentation of a most material fact—the bank supposing that Eliza Fitzpatrick was a widow, and capable of effectually discharging their existing liability, the discharge of which was the consideration for and basis of the new contract with Martin—the bank are, in my opinion, entitled to be relieved from it. The defendants, who alone resist this action, would be all necessary parties to any suit for that purpose. It may be that the relief to be obtained consequent upon holding

the bank not bound by it, will not be to make James Fitzpatrick and Martin interplead. The prayer of the petition is framed as if that consequence would not follow; it treats Mrs. Fitzpatrick, who would then be the person with whom the bank would have contracted, as a trustee of the fund on trusts of which the bank would have notice, but which they are unable to ascertain, and from which they seek to be relieved. It is said that there is no authority for such a construction except a dictum in Cochrane vs. O'Brien; and that such relief is inappropriate to the case of a bank deposit. No doubt the relation between banker and customer is ordinarily simply that of debtor and creditor, and not that of trustee and *cestui que trust*. But the cases referred to by Mr. Pallas and Mr. Walker establish clearly that *a bank may be fixed with notice of a trust* and responsible for the wrongful payment of moneys lodged with them which are bound by the trust."

See also National Bank vs. Life Ins. Co., 104 U. S., 54; L. Ed., 26, 693.

Further, as regards this principle of independent obligation as a ground for defeating an action of interpleader, it may be said that at least since 1860 it has not been followed in England, and that interpleader, in such a case can be maintained there (see Attenborough vs. London Dock Co., L. R., 3 C. P. Div., 450), while in this country, the doctrine of paramount title as applied to interpleader has been regarded as an anomaly in equity jurisprudence by such eminent authorities as Mr. Justice Story, the Court of Appeals, New York, and Mr. Pomeroy himself.

See Brief, pp. 28-30;

Also Crane vs. McDonald, 118 N. Y., 648.

BUT THE PRINCIPLE HAS NO APPLICATION WHATEVER TO THE PRESENT CASE:

Because the claims here are all equitable, and the principle is limited not merely to legal obligations, but to legal obligations independent of the question of property.

There is a wide and marked distinction between trustee and *cestui que trust,* bailor and bailee, and landlord and tenant.

The tenant may not dispute his landlord's title; a bailee is, to a large extent, estopped from denying his bailor's possessory right; whereas, in the case of a trustee and *cestui que trust,* the legal title is in the trustee, and the *cestui que trust* has only such beneficial interest as he can show himself equitably entitled to.

DUTY IN CASE OF NOTICE OF FRAUD.

After notice of fraud, a person should refuse to perform a contract so far as it is executory.

In Drener vs. Missouri Construction Co., 93 U. S., 92, this court states the rule as follows:

> "The portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a bona fide purchaser."

And again:

> "Upon receiving notice of fraud, his duty was to refuse further payment; and the facts before us required such refusal." * * *

> "The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it." * * *

> "As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud to which he becomes a consenting party."

So, in Reynolds vs. Aetna Life Ins. Co., 28 App. Div. (N. Y.), 591, 601, the court in a case of constructive trusts, says:

> "Actual fraud implies an intention to be unjust or to do injustice through concealment or misrepresentations and actions designed to carry out such intentions. It implies a criminal intent, and taints the conscience of all parties and *privies thereto.*"

The Trust Company, therefore, owed a duty to the appellants which it could not shirk; and after the notice, any attempt on its part to deal with the property to the prejudice of the rightful owners made it a privy to the fraud.

Points III and IV.

The fallacy of the appellees' contention is that it ignores the right that the appellants had to bring a suit to charge the complainant Trust Company as a trustee for them without applying for an injunction or giving a bond, and assumes as the major premise of the argument that appellants' only remedy was by injunction and bond.

It is true that after such a suit without injunction was brought, the Trust Company might, if it had thought best so to do, have transferred the stock to another trustee, or put it beyond the jurisdiction of the court, but it would have done so at its peril, and would, in case it was held to be a trustee for the appellants, have been obliged to return the stock, or account for it to them.

These points have also, heretofore, been discussed at length both in Brief and Reply Brief.

Further, the record shows not only that the appellants brought suit in West Virginia to enforce their rights, but that as soon as an opportunity was given them in the present case, they promptly set forth their claims, while the defendant-appellees declined to assert their title in either case, and directed all their efforts to preventing any decision on the merits.

Finally, the complainant Trust Company and the other appellees all knew, or could readily have ascertained, the exact status of the West Virginia suit, and if they had any reason whatever to believe there had been any want of diligence in connection with it, and wished to rely on such belief, they should have set it forth in their bill and answer, and given the appellants an opportunity to reply. Not having done so, it is submitted that it is not acting in good faith now to pretend merely by inference that there was want of diligence on the part of appellants without reference or regard to any facts showing the true state of the case.

CHARLES A. KEIGWIN,
GEORGE P. MONTAGUE,
Counsel for Appellants.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 21.

Supreme Court, U. S.
FILED.
OCT 26 1910
JAMES H. McKENNEY,

THE MOORE PRINTING TYPEWRITER COMPANY, a Body Corporate; RUSSELL W. MONTAGUE, and GEORGE P. MONTAGUE, Appellants,

against

NATIONAL SAVINGS AND TRUST COMPANY and AMERICAN PLANOGRAPH COMPANY, Bodies Corporate; ERNEST M. PEASE, HENRY J. GENSLER, *et al.*

BRIEF FOR HOLDERS OF TRUSTEE'S CERTIFICATES, APPELLEES.

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Supreme Court of the United States,

OCTOBER TERM, 1910,

No. 21.

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Statement of the Case.

This is an appeal by three of the defendants from a decree of the Court of Appeals of the Dis-

trict of Columbia, affirming a decree of the Supreme Court of the District rendered after a hearing upon the bill and answers. The bill was filed by the National Savings and Trust Company for the purpose of obtaining leave to resign and retire from its trust under a certain agreement, and to surrender the shares of stock then held by it to a new trustee, and for the instructions of the Court as to the manner and form of the transfer to its successor in the trust. The bill disclosed the following facts: On or about the 26th of April, 1906, certain persons, who then held in their different names 35,005 shares of the capital stock of the American Planograph Company, a corporation incorporated under the laws of West Virginia, transferred this stock to the complainant under an agreement commonly called a voting trust. This agreement provided that the trust company should issue to each person so transferring such stock a trustee's certificate, which should recite the number of shares so deposited by him, and state that the holder thereof was entitled to an equitable interest in such 35,005 shares equivalent to the number of shares deposited by him, and that on or after March 31, 1911, the holders of such certificates would be entitled to a certificate for an equal number of shares of the stock of the American Planograph Company. Provision was also made for the voting of the stock by the complainant in the manner directed by the owners of a majority in amount of the trustee's certificates; for the keeping of a record of the shares deposited and the names of the holders of trustee's certificates; for the collection of the dividends upon

the stock and the payment thereof to the holders of the trustee's certificates, and for the compensation of the complainant. It was further provided that upon the resignation of the complainant as trustee under the agreement, the holders of a majority in amount of the trustee's certificates should elect a trustee to fill the vacancy (fols. 9-18). A few weeks after the stock was so transferred to it, the complainant received a paper purporting to have been executed by the Moore Printing Typewriter Company, Russell W. Montague and George P. Montague, in which they stated that a large part of these 35,0005 shares was subject to a trust in their favor, and that a suit was then pending in the Circuit Court of Kanawha County, West Virgina, to determine the ownership thereof, and the complainant was cautioned not to transfer such stock or part with the possession thereof (fol. 20-22). Sometime after this (the exact date does not appear) Julia B. Moore and Cecil H. Moore brought suits against some of the holders of the trustee's certificates, and in these suits injunctions were issued restraining the defendants therein from removing or attempting to remove from the District of Columbia any of the stock of the American Planograph Company then in possession of the complainant. The complainant continued in the performance of its duties under the voting trust until sometime in June, 1907, when it gave the holders of the trustee's certificates notice of its desire to resign from its position as trustee, and thereupon the owners of a majority in amount of such certificates executed a paper designating the New York Trust Company of the City of New York as trustee under the

agreement in place of the complainant (fol. 18-19). All of these facts were set up in the bill, and the specific relief demanded was, "That the complainant may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee, and that the complainant may be instructed by the court as to the manner and form of transfer by it to its successor in the trust" (fol. 7). The defendants named in the bill included all the holders of the trustee's certificates and also the persons who had procured the injunctions, namely, Cecil H. Moore and Julia B. Moore, and as well those on whose behalf the written notice purported to have been given, that is, The Moore Printing Typewriter Company, and Russell W. Montague and George P. Montague. The defendants, other than the Moore Printing Typewriter Co. and the two Montagues, filed a joint answer in which they admitted substantially all the facts alleged in the bill, and consented that an order might be made permitting the complaint to retire from the trust and surrender the stock to the New York Trust Company, though they denied the allegation in the bill that the complainant could not transfer such stock to its successor without risk or liability of loss; and the defendants who had obtained the injunctions expressly declared their concurrence with the other defendants in this consent (fol. 82-85). The Moore Printing Typewriter Company and the two Montagues filed answers, wherein they allege that in January, 1900, and prior and subsequent thereto, the Moore Printing Typewriter Company, either by itself or through the Linomatrix Company (a sub-company, of which seven-tenths of the stock belonged to the Moore Printing Type-

writer Company and its stockholders), owned all the inventions and patents for the United States of the defendant Charles T. Moore, together with all his future improvements thereon; that thereafter Moore entered into a conspiracy with the defendant Henry L. Bryan and George R. Cornwall for the purpose of wrecking these two companies or acquiring their assets for an inadequate sum, and to that end entered into a contract with Cornwall by which he hired himself to Cornwall for the purpose of perfecting inventions relating to printing and taking out patents therefor, which inventions were of the same character as those which he had already assigned to the Moore Printing Typewriter Company; that the American Planograph Company was formed for carrying out this alleged fraudulent scheme, and that 26,831 shares of the stock of that company were issued to Moore, Cornwall and Bryan, or their appointees, and that this identical stock, or other stock issued for it, constituted the greater part of the 35,005 shares held in trust by the complainant (fol. 26-81). The complainant set the case down for hearing on the bill and answers (fol. 85), and after such hearing the Court, on the 13th of December, 1907, made a decree authorizing and directing the complainant to deliver the certificates of American Planograph Company stock to the New York Trust Company, but inserted in the decree a direction that it should be void, if on or before the 23rd of December, 1907, that is to say, within ten days, the Moore Printing Typewriting Company and the two Montagues, or either or any of them, should file a cross bill or original bill, as they might be advised, and apply for, and, upon giving the security required by the rules of the

court, obtain an injunction prohibiting the transfer of such certificates (fol. 100-101). From this decree the present appellants appealed to the Court of Appeals of the District of Columbia, where the decree was in all respects affirmed. They have now appealed to this court.

ARGUMENT.

I.

The appellants having admitted in their answer that the complainant was entitled to resign, and having asked for no relief except the appointment of a receiver, there is nothing in the decree for this Court to review.

In their answer, the appellants say: "This defendant admits on the allegations set forth in the bill of complaint, that the plaintiff is entitled to resign and be relieved of its trust, but it alleges on information and belief that the New York Trust Company has not consented to accept said trust, and further that no other responsible trust company will be likely to accept the same if it has full knowledge of the facts, and in view of all the facts and circumstances hereinabove set forth, including the restraining orders granted by this Court in Equity Suits Nos. 26731 and 26847, referred to in the bill of complaint, which orders

still remain in force, and prohibit the removal or transfer of the said 35,005 shares of Planograph stock, defendant submits that the plaintiff can be granted relief and the rights of all parties protected only by the appointment of a receiver for the said 35,005 shares of Planograph stock affected by said trust, who shall hold said stock subject to the orders of this Court until the rights of the various claimants thereto have been settled and determined" (fol. 47).

Now, here is a concession, in so many words, that the complainant was "entitled to resign and be relieved of its trust." How then can the appellants object to that part of the decree which authorizes this to be done? They certainly cannot say that they court erred in granting the relief to which they assented.

But if the complainant was to resign, some disposition had to be made of the stock. The appellants alleged, upon information and belief, that the New York Trust Company had not consented to act as trustee; but they did not claim that it was not a suitable trustee, or that their rights would be impaired if the stock were to be delivered to it. But if the New York Trust Company would not so consent, then the decree would go for naught, for the complainant, being authorized to deliver the stock to that one trust company, and to no other, could not make the transfer authorized by the decree.

Having admitted that the complainant was "entitled to resign and be relieved of its trust," what is the relief that the appellants pray for in their answer? Nothing more than that the court shall appoint a receiver "who shall hold the stock subject to the orders of the court until the rights

of the various claimants thereto shall have been settled and determined." There is no suggestion that the court shall determine those rights, or that anything shall be done, except that the complainant be allowed to resign and that a receiver be appointed. If the court had seen fit to appoint a receiver, then certainly they could not have said that they were aggrieved by the degree —which, indeed, they would not have wished to do, since this would have accomplished their purpose of tying up the stock without risk of any damage to themselves. But this was an interlocutory application, the granting or denial of which rested in the discretion of the judge who heard the case, and certainly it is not a point that can be reviewed here, if that judge saw fit to say, "I will not appoint a receiver, but I will entertain an application for another form of interlocutory relief, and if you will apply for an injunction, I will hear you."

And even if this court could review such a ruling, can it say that the relief which the appellants had leave to apply for was not appropriate and adequate? The appellants did not claim that the stock would be endangered if left with the complainant, and as a restraining order would have prevented the complainant from parting with the stock, such an order would have answered every legitimate purpose that the appellants could have had. And what are we to infer from their refusal to apply for this remedy? Can there be any doubt that they sought to impede and obstruct their co-defendants without giving security, and to circumvent the rule which is designed to prevent this result? And when a man will not apply for an injunction when he is invited to do so by the

court, what are we to think of the merits of his case? Does he not show by his unwillingness to incur the hazard of giving security, that he has no confidence in his claim?

As to the suggestion in the answer of the appellants that the restraining orders prohibited the removal of the stock, this difficulty was obviated by the consent of the persons who had obtained those orders (fols. 83-84).

II.

The bill is not one of interpleader; nor could the complainant have interpleaded the holders of the certificates issued by it.

The appellants assign it for error that the court below refused to hold that the bill was a bill of interpleader. But an inspection of this pleading will disclose that it is nothing like an interpleader, and was not intended to be such. Among other things a bill of interpleader must contain an offer to bring the property into court, (Ammendale Normal Institute *v.* Anderson 71 Md., 128; Bassett *v.* Leslie, 123 N. Y., 396, 399; M. & H. R. R. Co. *v.* Clute, 4 Paige Ch., 384, 391), while here the complainant makes no such proffer; but on the contrary, asks that it may be permitted to deliver the stock to the new trustee. Again, a bill of interpleader must contain an averment that the complainant is ignorant of the rights of the different claimants (Shaw

v. Carter, 8 Paige Ch., 339, 348; 23 Cyc. & Pro., 8 and cases there cited); but there is nothing of the kind in the present bill; and from all that appears, the complainant may have known that the Moore Printing Typewriter Company had no right to the stock. And several other averments necessary to a bill of interpleader are wanting. The nature of the bill is manifest, at a glance. It is framed upon the theory that the complainant, being a fiduciary, had the right to ask for the instructions of the court.

But what is more important is, that the bill discloses facts which make an interpleader impossible. The complainant had entered into an express agreement with the holders of its certificates that after the lapse of a certain time, it would return the stock to them; that in the meantime, it would pay the dividends to them; that it would vote upon the stock in accordance with their directions; and that, in the event of its resignation as trustee, they should have the right to select a new trustee to take over the stock, and perform these duties (fols. 9-14). The holders of the trustee's certificates, therefore, claim under their contract with the complainant, while the claim of the Moore Printing Typewriter Company is based upon an alleged antagonistic and paramount title. But the rule is well settled that one who is bound by an express contract cannot interplead the person to whom he is so bound and a stranger who claims under an antagonistic and paramount title (Pomeroy's Eq. Jur. (3d ed.), 1326-1327 and notes).

In Richardson *v.* Belt (13 D. C. App., 200) it was said: "An essential foundation of the equity of interpleader is, that the party seeking the re-

lief must not be under an independent or special liability to one of the claimants (Adams Eq., 204; 3 Pom. Eq., sec. 1327). Where there is an independent liability of the party seeking the relief to one of the several defendants, arising out of the relations subsisting between them or upon a special contract creating, for example, the relation of bailor and bailee, landlord and tenant, or creditor and debtor, there can be no interpleader, unless it be made to appear that others have acquired a claim of title or interest derived under the said liability."

A good illustration of this principle, and one in point here, is found in United States Trust Co. *v.* Wiley (41 Barb., 477). In that case a trust company received a sum of money and issued a certificate to the depositors by which it agreed to repay the sum to the depositors, or their assigns, with interest, on sixty days' notice; *held*, that the company could not bring a suit to compel the depositors and creditors who had attached the fund to interplead. The court said: "The trust company have agreed to pay the deposit to certain persons with interest. They cannot invoke the intervention of this court to disregard that contract, and inquire into the equities existing between the depositors and a class of persons who have no immediate, but only remote and contingent, rights, if any, in respect to the fund."

Now the only difference between that case and this is, that there the trust company received a deposit of money, while here it received a deposit of stock; but the trustees' certificate obligated the complainant to return the stock to the holders of the certificates just as effectually as the certificate of deposit obligated the United States

Trust Company to repay the money deposited with it.

In Lund *v.* The Seamen's Bk. for Savings (37 Barb., 129), which was an action against a savings bank by the assignee of a depositor to recover the sum deposited, it was held that the defendant could not set up as a defense that the deposit was the proceeds of securities belonging to third parties which the depositor obtained and fraudulently converted, and that such third parties had notified the defendant of those facts, and that they claimed the deposit as their property.

The court said: "No principle of law can, however, be found which permits a debtor for goods sold or for money lent or deposited to set up as a defense against the claim of his creditor that his title to the goods sold or money lent or deposited is defective or wrongful. That question is of no concern to the purchaser or borrower unless the third party, who claims to have been despoiled of his goods or money, will proceed by process of law to enforce his rights. It can never be permitted that a debtor may volunteer by plea or answer the protection of the claims of those with whom he has had no dealings to defeat his liability for the performance of his contracts. The law forbids the defendant to interplead because these third parties are not in privity with the depositor, but were claiming by a hostile and superior title" (p. 132).

See also:

Marvin *v.* Ellwood, 11 Paige Ch., 365, 370-371.
Pfister *v.* Wade, 56 Cal., 43, 50-51.
Sprague *v.* Soule, 35 Mich. 35.

Crawshay *v.* Thornton, 2 Myl. & Cr., 1.
Lindsey *v.* Barron, 6 C. B., 291.
Horton *v.* Devon, 7 D. & L., 206

III.

The bill is not one in the nature of an interpleader; nor was the complainant entitled to file such a bill.

Appearing to apprehend that the opinion of the Court of Appeals of the District may have effectually disposed of their contention that the bill was one of interpleader, counsel for the appellants now contend, that if it was not an interpleader, then it was in the nature of an interpleader. But here they meet with the same difficulties. The only difference between a strict interpleader and a bill in the nature of an interpleader is, that in the latter case the complainant may have some interest in the controversy. Story Eq. Pl., 297 b.) In all other respects the rules respecting interpleader apply, and among those the rule that one who is bound by an express contract cannot interplead the person to whom he is so bound and a stranger who claims under an antagonistic and paramount title. This subject was fully considered in Stephenson *v.* Burdett, (56 W. Va. 109). There the court, after stating the various rules respecting interpleader, and referring particularly to the rule that "interpleader will not lie if the plaintiff has incurred some personal obligation to either of the defendants, independent of the

title or right to possession", said: "How far are these general principles deviated from in what is called a bill in the nature of a bill of interpleader? The answer to that question will show whether this bill can be sustained. Under the foregoing principles, it clearly cannot be. If they do not govern bills in the nature of bills of interpleader, it may be that the relief here asked can be had. The only material difference between the two kinds of bills, pointed out by the courts and the law writers is that, in a bill in the nature of a bill of interpleader, the plaintiff may show that he has an interest in the subject matter of the controversy between the defendants. Sometimes the statement of the nature of this bill is very general and somewhat indefinite. Thus, in Story's Eq. Pl. (10th Ed.), section 297*b*, it is said: 'There are cases where a bill, in the nature of a bill of interpleader, will lie by a party in interest to ascertain and establish his own rights where there are other conflicting rights between third persons.' Substantially, the same language is used in 11 Enc. Pl. & Pr., 479, and in Sand's Suit in Eq., section 588. There is no suggestion by these authors that there is any further departure from the principles governing a pure bill of interpleader. Must not the defendants claim the same thing from the plaintiff, acording to the requirement in a pure bill of interpleader? Must not a relation of privity exist between the defendants? can a tenant require his landlord to interplead with a third person claiming under a strange and hostile title? If the plaintiff show by his bill that he is in the attitude of a wrongdoer towards one of the defendants, may he require an interpleader? The language of a definition of a bill in the

nature of interpleader, found in the books, does not answer any of these questions in the affirmative, or indicate that the principles governing a pure bill of interpleader are relaxed in any of these particulars. Nor do any of the decided cases countenance such a proposition."

Now, in the present case, the complainant did not claim any interest of its own in the stock; and if an interpleader of any sort had been proper, there was no necessity for resorting to a bill in the nature of an interpleader, but a bill of strict interpleader might have been filed. The element that distinguishes the two kinds of bills was wanting; but an element was present that was fatal to either sort.

It must be obvious that for the court to have construed the bill as one of interpleader or in the nature of an interpleader, would have been a gross injustice to the certificate holders, for if the bill had been in form for that purpose, the certificate holders could have demurred to it. These defendants, believing, as they had the right to do, that the bill was in fact what it purports to be—a bill for procuring an order directing the complainant to transfer the stock to the New York Trust Company and for instructions as to the manner of such transfer—answered that they were willing that the complainant should have such an order, though they protested that it was not necessary. But to hold now that the bill is something different from what it purports to be—that it is a bill of interpleader, though it omits the requisite averments of such a bill—would be the means of entrapping the certificate holders into waiving objections which would have been fatal to the bill.

IV.

The title to the stock could not be tried upon the bill and answers.

The appellants assign it for error that the court below decreed that the title to the stock could not be tried upon the bill and answers. But how was it possible to do this, if any regard was to be paid to the rules of equity pleading and to the rights of the other defendants? The claim of the appellants was against their co-defendants, and their object was to divest these co-defendants of their title to the stock; and this they sought to do by establishing a fraud on the part of some of them. Now, if these persons were to be charged with fraud, certainly they were entitled to an opportunity to deny the charge. But how could they do this if the charges were set forth only in an answer? No practice known to a court of equity allows an answer to be made to an answer. A defendant files an answer to the bill of complaint, but no one ever heard of a defendant answering the answer of a co-defendant.

As said by this court, "It is settled that one defendant cannot have a decree against a co-defendant without a cross-bill, with proper prayer and process or answer, as in an original suit. (*Smith v. Woodfolk*, 115 U. S. 143, 148). In *Chapman v. School District* (Deady, 108; Fed. Gas. 2607) it was said: "The function of an answer is to make a defense to the case made in the complaint. A defendant by means of an answer cannot become a complainant and seek affirmative relief, *either against the complainant or his co-defendants.*" So, in *Wetherbee v. American Freehold Land*

Mtg. Co. (77 Fed. Rep. 523) Simonton, J., said: "In equity a defendant can pray nothing in his answer except to be dismissed by the court. If he has any relief to pray, he must do so by cross-bill." Thus, it has been held that a defendant who holds a mortgage is not bound to put in any defense to the answer of a defendant alleging that such mortgage is void, and that such answer cannot be taken as confessed against the mortgagee. (Brinkerhoff v. Franklin, 21 N. J. Eq. 2334, 337). In this case, the court said: "Whitney states in his answer that the mortgage to Mars was without consideration, and fraudulent and void. To this answer Mars was not bound to put in any defense. That could not be taken as confessed against him. If Whitney wished to impeach the mortgage of Mars, his course was to file a cross-bill for that purpose. In general, one defendant cannot have any positive relief against another, except upon cross-bill. This is one of the offices of a cross-bill."

So, it has been held that, in a suit for partition, a defendant must file a cross-bill if he would have relief against a co-defendant holding an adverse and independent title. (Howe v. South Park Comrs., 119, 111, 101, 113). In the case last cited, it was said: "Undoubtedly, the rule is as counsel state it, that on a bill of partition, where the defendants claim the same relief for themselves as is sought by the original bill, no cross-bill is necessary. Whatever relief the defendants may be entitled to, against the complainants, in a bill for partition, may be obtained by them on answer. In such case, a cross-bill would be improper, for the rule is, when defendants ask only the same relief as complainants do, a cross-bill asking no other

relief would be dismissed on motion. But that is not this case. Here, these defendants appealing neither desired nor asked any relief as against the original complainant, and, of course, as to them, no cross-bill was necessary. What they now seek is affirmative relief against their co-defendants holding an adverse and independent title. That, they have not asked for by any cross-bill, and without such a bill no relief could, in any event, be granted to them."

And so, in a case where bondholders who had conflicting interests had been made defendants, the Supreme Court of Alabama said: "The various bondholders, moreover, held opposite interests, and being co-defendants, a cross-bill was both appropriate and necessary in order to adjust their conflicting priorities claimed over the subject-matter involved in litigation."

See also Commercial Nat. Bank v. Sandford, 103 Fed. Rep. 98, 104 Daniell Ch. Pr. (3rd Am. Ed. 1048).

V.

As the question of fraud could not be tried up on the bill and answers, the Court did not err in refusing to find that there was a constructive trust.

The appellants assign it for error that the court refused to find that the complainant held the stock as constructive trustee. Now, this whole conten-

tion that there was a constructive trust is based upon the alleged fraud of three of the co-defendants. But fraud is not to be presumed, and the party who charges it must set it up properly in some appropriate pleading, and establish it by competent evidence. In the present case, it should have been set up in a cross-bill, and the co-defendants who were sought to be affected by the charges should have been served with process, and required to answer the cross-bill; and unless they admitted the fraud (which they were not at all likely to do) the appellants must have proved their allegations—something very different from making averments on information and belief. Until this was done, the court could not find that any fraud had been committed, and had no basis upon which to erect a constructive trust.

VI.

The Court did not err in refusing to order the stock brought into Court.

It seems to be the contention of the appellants that the court should have directed the complainant to bring the stock into court. But how was it possible to make such an order in view of the well established rules of equity procedure? As the complainant had entered into an express contract with its certificate holders respecting the stock, it was in no position to bring the stock into court of its own motion. Nor did it offer to do so. And in the absence of such a right and such an offer

on the part of the complainant, what practice known to courts of equity would have warranted such an order? The rule has long been settled, that to entitle a party to a direction that money or stocks be deposited in court, he must show that his title is admitted, and the rule seems to require that the admission shall be made in the answer; in any event, the facts on which the application is based "must be found in the case as it then stands, either admitted, or so established as to be open to no further controversy at any subsequent stage of the proceedings."

McKim *v.* Thompson, 1 Bland Ch., 150, 159-160.
McTighe *v.* Wadleigh, 22 N. J. Eq., 81, 82-83.
McHardy *v.* Hitchcock, 11 Beav., 73.
Boschetti *v.* Power, 8 Beav., 98.
Proudfoot *v.* Hume, 4 Beav., 476.

Now, in the present case, the claim of the appellants is based wholly upon charges of fraud made against some of the co-defendants. But those co-defendants have never admitted these charges, nor have the charges ever been proved. They would have been the issues of fact to be heard and decided by the court, if the appellants had really cared to have them decided; and even if the allegations of fraud had been brought before the court in such a way that the court could have taken cognizance of them, the appellants at most could have asked for an injunction; but here they claim, that without putting their charges into a pleading which the court could notice, they were entitled to relief never granted before.

VII.

The appellants were not required to obtain an injunction as a condition of asserting their rights against the stock.

In their assignment of errors the appellants complain that by the decree they were "permitted to assert their rights against the stock only upon condition of obtaining an injunction and giving a bond." But here they seem to find something in the decree that is not there. The requirement that they should apply for an injunction was not a condition of having leave to assert their claims, but merely a condition upon which the court would prohibit a transfer to the new trustee. Even though they did not obtain an injunction, they might proceed with the suit which they say in their notice they had brought in West Virginia, or they might sue in the District of Columbia, or in New York, or in any other jurisdiction they might select. They were left at liberty to bring any suit they pleased in any court they pleased, and to assert their charges of fraud in any tribunal that would hear them. It was only in answer to their demand for the appointment of a receiver that the provision was inserted in the decree that they might apply for an injunction.

Nor could the transfer authorized by the decree impair the rights of the appellants in any way. The stock was not to be delivered to the persons whose title they were seeking to divest, but to a responsible trust company, and the appellants, if they could establish their contentions, could impress it with a trust in the possession of the new

trustee quite as well as in the possession of the complainant. In short, the action of the court amounted to no more than this that the complainant, being bound by its contract to deliver the stock to the substituted trustee selected by the holders of its certificate, was permitted to perform its obligation, unless the appellants should pursue the remedy appropriate in such a case, viz., obtain a restraining order.

VIII.

The appellants were not aggrieved by the decree.

In order that we may determine whether the appellants were aggrieved by the decree, we are to consider what their rights were with respect to the stock. They had no title to the stock, but merely the right to bring an action for the purpose of establishing their charges of fraud, and through these charges, if they could be made out by competent evidence—a thing oftener not done than done, as the reported cases show—then to have a constructive trust declared in favor of the Moore Printing Typewriter Company. And if, upon bringing such a suit, they could show to the Court that their rights would be lost by the removal of the stock from the jurisdiction, they could apply to the court for an injunction to restrain such removal. These were the only rights they had in the matter. But all these were secured to them by the decree. How then were they injured? They lost nothing that the law could

recognize, though they did lose what they aimed at—the opportunity to harass and obstruct without incurring liability for the damage they should do.

IX.

If the complainant had not been permitted to deliver the stock to the new Trustee, the rights of innocent third persons would have been impaired.

It will be noted that the claim of the appellants relates to only 26,831 shares of the stock held by the complainant (fol. 40). As to the resident of the stock, the right of the certificate holders is not disputed. But it is evidence that, unless the complainant had been allowed to discharge its duty under the voting trust agreement, by delivering the stock to the new trustee, the rights of these certificate holders, against whom no claim is made, would have been seriously impaired. They had deposited their stock with the complainant that they might get the benefit of the voting trust agreement, and if this agreement could not have been carried out according to its terms they certainly would have been injured. Courts of equity are always careful that their decrees shall not operate to the prejudice of third persons; and it would indeed be a hardship to deprive such persons of clear contractual benefits upon the application of parties who are not even

willing to give security for the damages they may do.

X.

The practice which the appellants ask the Court to adopt would produce many mischiefs.

It seems to be the idea of the appellants that, without giving any security, and without even prosecuting their charges of fraud, but by the bare assertion of such charges, and by writing letters, they could tie up the stock indefinitely, and prevent the complainant from performing its contract with the holders of its certificates. But is it not apparent that serious mischiefs must follow, if this court should countenance such notions? It would open a way for irresponsible persons to obstruct some of the most important business of the country. The deposit of stock and bonds with trust companies is an everyday occurrence, and a necessary step in many fiscal operations. But if persons who are not parties to the deposit, by merely making claims of paramount title based upon an alleged fraud, and by merely serving a notice on the depositary, can prevent it from applying those stocks and bonds in the manner directed in the deposit agreement, who would be safe in making such a deposit? And not only would such a rule affect the person charged with fraud, but persons not even claimed to have any connection with it. If this were the law, a man asked to make such a deposit would have to say—

"How can I do it with safety? How do I know but that some man out in California or down in Texas may not write a letter to the trust Company saying that some of the other persons depositing stock have acquired that stock by fraud? And if this should be done—and there are always people ready to do such things—the trust company will not be able to transfer the stock in accordance with the agreement, and not only will I be disappointed as to the benefits I had expected under the agreement, but I may have my stock tied up where I cannot get it or use it." In short, if the contentions of the appellants should have the approval of this court, the deposit of any securities with a trust company would soon become ~~with the agreement, and not only will I be dis~~

To make charges of fraud is easy enough (though, as the decisions show, to prove these charges is another matter) and, with this case as a precedent, unscrupulous persons would soon learn how easily they could become obstructionists, and whenever there was to be a railway re-organization or other transaction involving the deposit of stock or bonds, they would say that in some way they had been defrauded, and following the example set them by the appellants, would serve notice upon the depositary, and then the persons who made the deposits would either have to submit to vexatious delays or pay the tribute demanded.

JOHN J. CRAWFORD,
Counsel for holders of trustees' certificates, Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 21.

THE MOORE PRINTING TYPEWRITER COMPANY, *et al.*,
Appellants,

vs.

THE NATIONAL SAVINGS & TRUST COMPANY, *et al.*,
Appellees.

BRIEF FOR THE NATIONAL SAVINGS & TRUST COMPANY, APPELLEE.

STATEMENT.

On the 26th day of April, 1906, under an agreement printed at page 6 of the Record, certain of the individual appellees, hereinafter called for brevity the depositors, deposited with the National Savings & Trust Company 35,005 shares of the capital stock of the American Planograph Company, pooled by the depositors, to be held by

the Trust Company for five years, with an express reservation by the latter of the right to resign the trusteeship at any time within that period, in which event the holders of a majority in amount of the shares were to elect a trustee to fill the vacancy. Promptly thereafter, on May 22, 1906, the appellants served upon the trustee the notice which appears at page 12 of the Record, to the effect that "a large part of said thirty-five thousand and five (35,005) shares of stock" was claimed by the appellants, and that a suit was then pending in the Circuit Court of Kanawha County, West Virginia, to determine the ownership thereof. As shown by the cross bill subsequently filed by the appellants, this Kanawha County suit was unaccompanied by service upon any of the defendants thereto, and was therefore never prosecuted; notwithstanding which fact, and the knowledge by the appellants of the whereabouts and custody of the shares which their notice discloses, nothing further was done by them toward assertion of their alleged rights in the stock. Subsequently, two equity suits against the depositors were instituted by the appellees Julia B. Moore and Cecil H. Moore, who obtained restraining orders against the removal of the shares from the District of Columbia, or any disposition thereof pending those suits.

Thereupon, the National Savings & Trust Company filed its bill in this cause, stating that it had elected to exercise the right of resignation reserved by it in the pooling agreement and had so informed the depositors, that the latter had selected the New York Trust Company as its successor in the trust, that it was advised that, in consequence of the notice served upon it by the appellants, and with the restraining orders still outstanding in the two equity causes, it might not transfer the shares to the new trustee without risk, and that in its capacity as trustee it was entitled to

apply to the court for its instructions and protection in the premises, accompanied by a prayer that it might be permitted to resign and retire from its trust, to surrender the shares to the new trustee, and to be instructed by the court as to the manner and form of transfer by it to its successor.

The appellants filed answers comprising a lengthy and somewhat confused statement of facts, the entire substance of which, apart from certain charges of fraud against several of the appellees, without apparent materiality either to the bill or to its controversy with the depositors, appears to be as follows:

1. That under certain contracts, printed at pages 40-46 of the Record, the American Planograph acquired the letters patent, patent rights, inventions, machines, methods and processes of the Moore Printing Typewriter Company, of which the individual appellants were stockholders, and agreed in consideration thereof to distribute 10,000 of its shares of stock among the stockholders of the Moore Printing Typewriter Company, and to retain 18,000 additional shares for its own benefit; that these two blocks of stock, aggregating 28,000 shares, the appellants were informed and believe were included in the 35,005 shares deposited with the complainant, and that the Depositors were endeavoring to convert the same to their own use in evasion and fraud of the rights of the appellants.

2. That (Rec., p. 25) the appellants admitted that the complainant was entitled to resign and be relieved of its trust, but alleged on information and belief that the New York Trust Company had not consented to accept the trust, and that no other responsible Trust Company would be likely to do so after full knowledge of the facts, and that, in view of the circumstances, including the existence of the restraining orders in the equity suits, the appellants

submitted that relief could be granted and the rights of all parties protected only by the appointment of a receiver for the shares, to hold the same subject to the orders of the court until the rights of the various claimants should be determined.

The depositors and the complainants in the two equity suits united in an answer (Rec., p. 48), consenting to an order permitting the complainant to retire and resign from its trust, to surrender the shares to the New York Trust Company as its successor, and to be instructed by the court as to the manner and form of transfer. Thereupon the complainant set the cause down for hearing upon the bill and answers, when, the cause coming on regularly for hearing at the December, 1907, term of court, having been argued, and the court being ready to render its decree, the appellants applied for and obtained leave to file their cross bill (Rec., p. 51), reiterating the charges of its answer, adding some additional charges of fraudulent conduct upon the part of certain of the depositors, again expressing its willingness that the complainant might be permitted to resign and retire, "provided that some other person or corporation can be found to assume the said trust in the same condition in which the same now exists, and without altering the existing status of the said stock to the prejudice of this complainant," submitting that such new trustee should be a responsible person or corporation, preferably a resident of the District of Columbia, who should be required to enter an appearance in the cause, to be made a party defendant in the cross bill, and to hold the stock subject to the direction of the court, etc.

The court, finding that, even after the filing of the cross bill, all the parties conceded the complainant's right to the relief it prayed, and that no objection was made to the New York Trust Company, its suggested successor, if it

were willing to assume the trust, and being informed that that Company was willing, passed its decree (Rec., p. 58), authorizing and directing the complainant to deliver to the New York Trust Company, as its successor in the trust, the 35,005 shares, with such endorsement as might be required to enable the new trustee to take complete possession thereof, and that, upon compliance with the decree, the complainant should thereupon be discharged from all liability to any of the defendant claimants thereto, but with a proviso that the decree should become void if, within ten days thereafter, the appellants or any of them should sue out a restraining order or injunction prohibiting such transfer, with an injunction undertaking as required by Equity Rule 42, and with a further provision, consented to by the defendants to the cross bill, that service of process thereunder might be made upon the latter through their attorney of record in the cause.

The appellants, without awaiting the expiration of the time in which the decree should become final, sued out their appeal to the Court of Appeals, from whose decree affirming the decree below the appeal to this court is taken. No service of process under the cross bill was had, nor any further proceedings thereunder taken.

POINTS AND AUTHORITIES.

The brief on behalf of the appellants will be found, upon examination, to rest wholly upon two curious errors of assumption.

I. The first of these erroneous assumptions is that the action of the complainant below in setting down the cause for hearing on bill and answers, was, and must be taken as, an admission by the depositor defendants of the truth of the allegations of the appellants' answers, and that the court should have proceeded to a final decree in favor of the latter, awarding them the disputed shares.

The setting down of a cause for hearing on bill and answers is, elementarily, the same in equity as a demurrer at law, and amounts to an admission by the demurrant that the allegations of the answers are true. The complainant below, finding its right to the relief which was the sole object of its bill and of its prayers for relief, conceded by all of the parties, and having, itself, no interest whatever in the controversies disclosed by the appellants' answers, conceived that it might safely set the cause down upon the bill and answers, admitting the allegations of the latter in so far as itself was concerned. Upon what theory the appellants conceived that this could be an admission of the allegations of their answer by its co-defendants below, is not apparent. The latter had been called upon by the process of the court to answer, not the answers of the appellants, but the bill of complaint in the cause, and this they had fully done. Neither during the fourteen months which intervened between their notice to the complainant of March 22, 1906, and the institution of the suit below, nor during the interval between the filing of the bill and the actual argument of the case on final hearing, had the appellants done anything whatever to assert their claims to the stock, or to require their co-defendants to answer those claims.

II. The second erroneous assumption, upon which every remaining proposition of the brief, with its citation of authorities, rests, is that the bill in this cause is either a bill in the nature of interpleader, or a bill for instructions as to the rights of the contending parties to the stock, and the disposition of the same as between them.

The brief concedes that the complainant, being under a contractual obligation to hold the shares for the depositors

and to account for the same to them, could not file a bill of interpleader. Neither having nor claiming any interest of its own in the shares, it is perhaps equally plain that it could not file a bill in the nature of an interpleader. Fletcher's Pl. & Prac., Sec. 792 and citations.

But, whether entitled to be considered a bill in the nature of interpleader or a bill for instructions, there must, in order to have the effect sought to be attributed to it by the appellants, have been an application to the court to ascertain and determine the relative merits of the conflicting claims of the parties to the shares, and to dispose of the shares accordingly; whereas the slightest examination of the bill discloses the fact that it had no such object, but sought instructions, only, how the complainant might exercise its right, reserved by its contract, to resign and retire from its trusteeship with safety to itself.

No authority is cited, nor can any exist, which holds that the court, of its own motion, may go beyond the scope and purpose of the bill and require the claimants to litigate their contentions, though neither has taken any steps to that end, and the bill has not invited such relief, *ut sit finis litium*.

III. But, in the third place, even if it were possible to conceive of a successful predication of error upon a decree which simply gives to a complainant relief to which the answers of all the parties admit he is entitled, by the appointment of a new trustee, to whose fitness and responsibility exception is taken by none, it is difficult to see upon what ground such error can be claimed to be prejudicial, or ground for reversal. The stock in the hands of the new trustee is as amenable as it ever was to the claims of the appellants, and their position is improved, even, by the decree, which requires the contesting claimants to accept service of process through their attorney of record in the

cause. Failing in what would appear to have been the object of their cross bill, namely, to impose upon the adversary parties practically the burden of an injunction, with its consequent delay and destructive effect upon assets consisting principally of rights under letters patent, the duration of which is constantly diminishing, and at the same time to relieve themselves from the corresponding duty of protecting their adversaries by an injunction bond, with the attendant risk and responsibility to themselves, they practically abandoned their cross bill and contented themselves with taking an appeal, upon a mere cost bond, leaving the present appellee The National Savings & Trust Company no alternative but to comply with the decree, passed for its relief and in accordance with the prayers of its own bill, which it has done, or else to appeal from that decree, and, itself, assume the risk and responsibility of a supersedeas bond, which the appellants were unwilling to do.

IV. The appellants labor under still another difficulty, it is submitted, equally insuperable. The court has not, by its decree or otherwise, refused to proceed to determination of their claims to the shares, or to any relief in respect to them which they seek. On the contrary, it has allowed them to file their cross bill, which was the first pleading in the case giving foundation for a judicial determination of their controversy with the opposing claimants, and the very decree appealed from provides for prompt and early service upon the latter to that end. What, then, have the appellants to complain of?

It is respectfully submitted that the decree below should be affirmed.

J. J. DARLINGTON,
Solicitor for National Savings & Trust Company.

Office Supreme Court U. S.
FILED
APR 29 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909

(No. [redacted] 21.

THE MOORE PRINTING TYPEWRITER CO. ET AL.,

vs.

NATIONAL SAVINGS AND TRUST CO. ET ALS.

BRIEF ON BEHALF OF APPELLEES RICHARD C. THOMPSON and J. KEITH M. NORTON, TRUSTEES

By J. K. M. Norton,
For Appellees, Richard C. Thompson and J. Keith M. Norton, Trustees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909

(No. 192)

THE MOORE PRINTING TYPEWRITER CO. ET AL.,

vs.

NATIONAL SAVINGS AND TRUST CO. ET ALS.

BRIEF ON BEHALF OF APPELLEES RICHARD C. THOMPSON and J. KEITH M. NORTON, TRUSTEES

STATEMENT OF THE CASE

This is an appeal from a decree of the Court of Appeals of the District of Columbia, sustaining the decree of the lower court, granting the prayers of the bill, but allowing appellants time within which, by way of cross-bill, or original bill, to apply for and obtain a restraining order or injunction in accordance with rule 42 of the trial court.

The complainant in this case (one of the appellees) filed its bill for the purpose of obtaining leave to resign and retire from its trust under a certain voting trust agreement, and to surrender the shares of stock held by it to a new trustee, and for the in-

structions of the court as to the manner and form of transfer to the substituted trustee. A copy of the agreement under which the stock was held is annexed to the bill (Exhibit A. Rec., pp. 6-8). The agreement is made by Bessie P. Cornwall and others, as parties of the first part, with the complainant as party of the second part. After reciting that the purpose is to hold together in trust a majority of the stock of the American Planograph Company in order to secure a safe and prudent management of the company, this agreement provides that the parties of the first part shall transfer to the complainant 35,005 shares of the capital stock of the American Planograph Company in trust, for the purposes and uses of the agreement; that the complainant shall issue to each person so transferring such stock a trustee's certificate, which shall recite the number of shares so deposited by him and state that the holder thereof is entitled to an equitable interest in such 35,005 shares equivalent to the number of shares deposited by him with the complainant, and that on and after March 31, 1911, the holders of such certificates will be entitled to a certificate for an equal number of shares of the stock of the American Planograph Company. The agreement further provides that on and after March 31, 1911, the complainant shall forthwith cause to be transferred on the books of the American Planograph Company the stock so held in trust and deliver the certificates thereof to each of the holders of the trust certificates. Provision is also made for the transfer of the American Planograph stock upon the books of that company to the complainant, and the voting of the stock by the complainant in the manner directed by the owners of a majority in amount of the trustee's certificates; for the keeping of a record of the shares deposited and the names of the holders of trustees' certificates; for the collection of the dividends upon the stock and the payment thereof to the holders of the trustees' certificates, and for the compensation of the complainant as such trustee. It is further provided that upon the resignation of the complainant as trustee, under the agreement, the holders of a majority in amount of the trust certificates shall elect a trustee to fill the vacancy.

The complainant in its bill then showed that, in performance

of the agreement, 35,005 shares of the stock of the American Planograph Company were transferred to it, and trustees' certificates issued therefor; that the complainant had notified the parties in interest, under and through whom it derived its position of trustee, of its desire to resign such position, and that the holders of a majority in amount of the trust certificates had duly appointed the New York Trust Company, of the City of New York, to be trustee under the agreement in place and stead of the complainant. The complainant further showed that in suits brought by Cecil H. Moore and Julia B. Moore, respectively, injunctions had been granted restraining the complainant from removing the stock from the District of Columbia, and also that the complainant had received a paper, purporting to be executed by the Moore Printing Typewriter Company and Russell W. Montague and George P. Montague, wherein they claimed that a large part of such 35,005 shares were subject to a trust in their favor. The specific relief demanded in the bill is "That the complainant may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee, and that the complainant may be instructed by the court as to the manner and form of transfer by it to its successor in said trust."

The defendants named in the bill include the holders of the trustees' certificates issued by the complainant, and also Cecil H. Moore, Julia B. Moore, The American Planograph Company, The Moore Printing Typewriter Company, and Russell W. Montague and George P. Montague. The defendants, other than the Moore Printing Typewriter Company and the two Montagues, filed a joint answer, in which they admitted substantially all the facts alleged in the bill, and consented that an order might be made permitting the complainant to retire from the trust and surrender the stock to the New York Trust Company, though they denied the allegations in the bill that the complainant could not transfer such stock to the New York Trust Company, or its successors in the trust, without risk or liability of loss (Rec., pp. 48-49).

The Moore Printing Typewriter Company and the two Montagues, appellants, filed answers, wherein they alleged that in January, 1900, and prior and subsequent thereto, the Moore

Printing Typewriter Company, either by itself or through the Linomatrix Company (a sub-company, of which seven-tenths of the stock belonged to said Moore Printing Typewriter Company and its stockholders), owned all the inventions and patents for the United States of the defendant Charles T. Moore, together with all his future improvements thereon; that thereafter Moore entered into a conspiracy with the defendant Henry L. Bryan and George R. Cornwall for the purpose of wrecking said two companies or acquiring their assets for an inadequate sum, and to that end entered into a contract with Cornwall by which he hired himself to Cornwall for the purpose of perfecting inventions relating to printing and taking out patents therefor, which inventions are of the same character as those which he had already assigned to the Moore Printing Typewriter Company; that the American Planograph Company was formed for carrying out this alleged fraudulent scheme, and that 26,831 shares of the stock of that company were issued to Moore, Cornwall and Bryan, or their appointees, and that this identical stock, or other stock issued for it, constitutes the greater part of the 35,005 shares held in trust by the complainant. (Rec., pp. 45-47).

The complainant set the case down for hearing on bill and answer (Rec., p. 50), and after such hearing the decree was made from which this appeal has been taken (Rec., p. 58). On the same day the Moore Printing Typewriter Company, by leave of the court, filed a cross-bill, but no subpoena to answer has been issued thereunder (Rec., pp. 51-57), and no injunction or restraining order was asked for.

ARGUMENT.

I.

THIS COURT IS WITHOUT JURISDICTION BECAUSE THE APPEAL WAS TAKEN PREMATURELY.

It will be noted that the appeal from the trial court was taken on the day that the decree was made (Rec., pp. 58-59). But the decree, by its terms, did not become final until after the 23d day of December, 1907. Until then it was liable to be defeated by the action of the appellants, nor could the complainant act under it before that time. It was effective for no purpose whatever until the date upon which it would become absolute. It was therefore not a final decree when the appeal was taken.

Hall v. Clapp, Ct. App., D. C., No. 1835, October term, 1907.

II.

THE BILL IS NOT ONE OF INTERPLEADER, NOR COULD THE COMPLAINANT HAVE INTERPLEADED THE HOLDERS OF THE CERTIFICATES ISSUED BY IT.

The argument of the appellants is based upon the assumption that the bill is a bill of interpleader. But an inspection of the pleading will disclose that it is nothing like an interpleader, nor was it intended to be such. It is framed upon the theory that the complainant, being a fiduciary, had the right to ask for the instructions of the court. A bill of interpleader must, among other things, contain an offer to bring the property into court (Ammendale Normal Institute v. Anderson, 71 Md., 128; Bossett v. Leslie, 123 N. Y., 396); but here the complainant makes no such suggestion, but, on the contrary asks that it may be permitted to deliver the stock to the new trustee.

Again, a bill of interpleader must contain an averment that the complainant is ignorant of the rights of the different claimants (Shaw v. Carter, 8 Paige, 339, 348; 23 Cyc. Law & Pro. 8); but there is nothing of this kind in the present bill; and, from all that

appears, the complainant may have known that the Moore Printing Typewriter Company had no right to the stock.

The bill was drawn by eminent and experienced counsel, and surely if he had intended to file a bill of interpleader, he would, have prepared one in suitable form, and one containing allegations appropriate to such a bill.

But what is more important is that the bill discloses facts which make an interpleader impossible. It is elementary that one who is bound by an express contract cannot interplead the person to whom he is so bound and a stranger who claims under an antagonistic and paramount title (Pomeroy's Eq. Jur. (3d Ed.) 1326-1327 and notes).

In Richardson v. Belt (13 D. C. App., 200) it was said: "An essential foundation of the equity of interpleader is, that the party seeking the relief must not be under an independent or special liability to one of the claimants (Adams Eq., 204; 3 Pom. Eq., sec. 1327). Where there is an independent liability of the party seeking the relief to one of the several defendants, arising out of the relations subsisting between them or upon a special contract creating, for example, the relation of bailor and bailee, landlord and tenant, or creditor and debtor, there can be no interpleader, unless it be made to appear that others have acquired a claim of title or interest derived under the said liability."

A good illustration of this principle, and one in point here, is found in United States Trust Co. v. Wiley (41 Barb., 477). In that case a trust company received a sum of money and issued a certificate to the depositors by which it agreed to repay the sum to the depositors, or their assigns, with interest, on sixty days' notice; *held*, that the company could not bring a suit to compel the depositors and creditors who had attached the fund to interplead. The court said: "The trust company have agreed to pay the deposit to certain persons with interest. They cannot invoke the intervention of this court to disregard that contract, and inquire into the equities existing between the depositors and a class of persons who have no immediate, but only remote and contingent, rights, if any, in respect to the fund."

Now the only difference between that case and this is, that there

the trust company received a deposit of money, while here it received a deposit of stock; but the trustees' certificates obligated the complainant to return the stock to the holders of the certificates just as effectually as the certificate of deposit obligated the United States Trust Company to repay the money deposited with it.

In Lund v. Seaman's Bk. for Savings (37 Barb., 129), which was an action against a savings bank by the assignee of a depositor to recover the sum deposited, it was held that the defendant could not set up as a defense that the deposit was the proceeds of securities belonging to third parties which the depositor obtained and fraudulently converted, and that such third parties had notified the defendant of those facts, and that they claimed the deposit as their property.

The court said: "No principle of law can, however, be found which permits a debtor for goods sold or for money lent or deposited to set up as a defense against the claim of his creditor that his title to the goods sold or money lent or deposited is defective or wrongful. That question is of no concern to the purchaser or borrower unless the third party, who claims to have been despoiled of his goods or money, will proceed by process of law to enforce his rights. It can never be permitted that a debtor may volunteer by plea or answer the protection of the claims of those with whom he has had no dealings to defeat his liability for the performance of his contracts. The law forbids the defendant to interplead because these third parties are not in privity with the depositor, but were claiming by a hostile and superior title" (p. 132).

It must be obvious that for the court to construe the bill as one of interpleader would be a gross injustice to the certificate holders, for if the bill had been in form for that purpose the certificate holders could have demurred to it. These defendants, believing, as they had the right to do, that the bill was in fact what it purports to be—a bill for procuring an order directing the complainant to transfer the stock to the New York Trust Company and for instructions as to the manner of such transfer—have answered that they are willing that the complainant shall have

such an order, though they protest that such an order is not necessary. But to hold now that the bill is something different from what it purports to be—that it is a bill of interpleader, though it omits the requisite averments of such a bill—would be the means of entrapping the certificate holders into waiving objections which would have been fatal to the bill.

III.

THE APPELLANTS ARE NOT ENTITLED TO THE CONSIDERATION OF A COURT OF EQUITY, SINCE THEIR OBVIOUS PURPOSE IS TO CIRCUMVENT THE RULE OF THE COURT BY OBTAINING THE EFFECT OF A RESTRAINING ORDER WITHOUT GIVING SECURITY.

As shown by the pleadings, the appellants served upon the complainant a notice that they claimed a part of the stock by reason of an alleged constructive trust, but though more than a year had elapsed, they had brought no suit in this jurisdiction to enforce their claims. Had they begun such a suit, what course would they have had to adopt in order to prevent the complainant from delivering the stock to the certificate holders, or sending it out of the District? Why, very plainly they would have had to procure a restraining order. And the mere bringing of a suit would not have had this effect. In addition to filing their bill, they must have obtained an injunction, if they would have prevented a disposition of the stock pending the trial and decision of the case. But can they be in any different position merely because the complainant, instead of complying with the terms of the agreement it had made with the certificate holders, comes into court and asks for instructions?

And what was the state of the pleadings when the decree was made? The appellants had filed an answer in which they averred that, by reason of alleged frauds on the part of Moore, Bryan and Cornwall, the Moore Printing Typewriter Company was entitled to have a trust *ex maleficio* declared in its favor with respect to a part of the stock. But it is plain that this claim vitally affected the holders of the trustees' certificates; and hence it could not be heard merely upon an answer to the bill

but for this purpose it was necessary that the appellants file either an original bill or a cross-bill, and serve upon the holders of the trustees' certificates the usual process in such cases. It was only in this mode that the appellants could proceed to assert their claims; and this was just what the order of the court gave them the opportunity to do. And when they refused to avail themselves of this privilege, what are we to infer from such refusal? Can there be any doubt but what their object was to tie up the stock without giving security, and to circumvent the rule which is designed to prevent this result? And when a man will not apply for an injunction when he is invited to do so by the court, what are we to think of the merits of his case? Does he not show, by his unwillingness to incur the hazard of giving security, that he has no confidence in his claim?

IV.

AS THE APPROPRIATE REMEDY OF THE APPELLANTS WAS AN INJUNCTION, AND AS THE RIGHT TO APPLY FOR SUCH AN ORDER WAS RESERVED TO THEM, THEY WERE NOT INJURED BY THE DECREE.

The object of the complainant, as disclosed by the bill, was to deliver the stock to the New York Trust Company, and the object of the appellants was to prevent the stock from being sent to New York. Now, where a person makes claim against property which is about to be taken from the jurisdiction, what is his appropriate remedy? Why, to take out an injunction. If the appellants were given an opportunity to apply to the court for the only remedy appropriate under the circumstances, what ground of complaint have they? They cannot say that they have been prejudiced, if they will not adopt the remedy which the law provides for such case.

V.

FOR THE COURT NOT TO HAVE MADE THE DECREE WOULD HAVE IMPAIRED THE RIGHTS OF INNOCENT PERSONS AGAINST WHOM NO CLAIM WAS MADE.

It will be noted that the claim of the appellants relates to only

26,831 shares of the stock held by the complainant (Rec., p. 22). As to the residue of the stock, the right of the certificate holders is not disputed. But it is evident that, unless the complainant had been allowed to discharge its duty under the voting trust agreement, by delivering the stock to the new trustee, the rights of these certificate holders, against whom no claim is made, would have been seriously impaired. They had deposited their stock with the complainant that they might get the benefit of the voting trust agreement, and if this agreement could not have been carried out according to its terms they certainly would have been injured. Courts of equity are always careful that their decrees shall not operate to the prejudice of third persons; and it would indeed be a hardship to deprive such persons of clear contractural benefits upon the application of parties who are not even willing to give security for the damage they may do.

It is accordingly submitted that the Court of Appeals of the District of Columbia committed no error in sustaining the decree, and that the same should be affirmed.

J. K. M. NORTON,
For Richard C. Thompson and
J. Keith M. Norton, Trustees.

